LIBRARY
SUPREME COURT, U. S.

APPENDIX

JUL 19 1973
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-6160

LAWRENCE MITCHELL,

Petitioner,

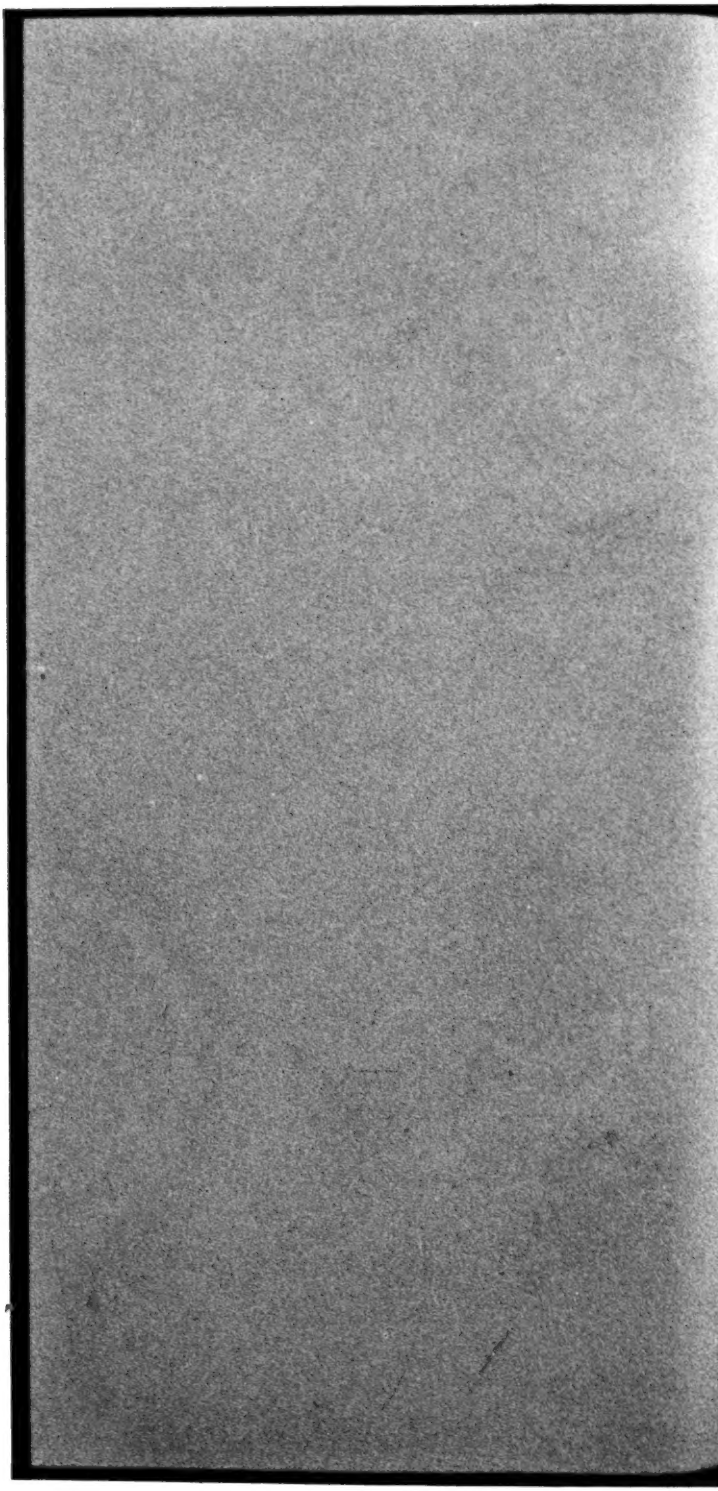
—v.—

W. T. GRANT COMPANY,

Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

PETITION FOR CERTIORARI FILED FEBRUARY 5, 1973
CERTIORARI GRANTED MAY 14, 1973



Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-6160

LAWRENCE MITCHELL,

Petitioner,

—v.—

W. T. GRANT COMPANY,

Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

INDEX

	Page
Chronological List of Relevant Docket Entries	1
Record from First City Court for the City of New Orleans	3
Plaintiff's Petition and Affidavit filed February 2, 1972	3
Order authorizing Sequestration filed February 2, 1972	5
Bond for Writ of Sequestration filed February 2, 1972	6
Citation and Writ of Sequestration issued by Clerk on February 2, 1972 and Return of Constable on February 18, 1972	9
Defendant's Motion to Dissolve Writ of Sequestration filed March 3, 1972, and order fixing hearing to be held March 14, 1972	13
Stipulation of Counsel at hearing on Motion to Dissolve Writ of Sequestration entered on March 14, 1972	16
Judgment of First City Court filed March 16, 1972	17

Page

Record from First City Court for the City of New Orleans —Continued

Reasons for Judgment (or Opinion) of First City Court filed March 16, 1972 18

Judgment and Opinion of Louisiana Court of Appeals for the Fourth Circuit filed March 28, 1972 20

Opinion of Louisiana Supreme Court filed November 6, 1972.. 23

Judgment of Louisiana Supreme Court refusing rehearing filed December 11, 1972 36

Grant of Certiorari and Motion to Proceed *In Forma Pauperis* by United States Supreme Court, May 14, 1973 37

LAWRENCE MITCHELL, PETITIONER

v.

W. T. GRANT CO., RESPONDENT

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

February 2, 1972, plaintiff W. T. GRANT's original petition, affidavit, claim for $574.17 and bond filed in First City Court for the City of New Orleans, State of Louisiana.

February 2, 1972, plaintiff's petition for writ of sequestration grant by First City Court.

February 2, 1972, citation and writ of sequestration issued by clerk of First City Court.

February 7, 1972, date stamp on Constable's return unsigned and crossed out.

February 18, 1972, constable of First City Court executed writ of sequestration by seizing the household goods and served petition and citation.

March 3, 1972, defendant MITCHELL's motion to dissolve the writ of sequestration filed, asserting *inter alia* the denial of due process of law in violation of 14th Amendment of the United States Constitution.

March 14, 1972, hearing on motion to dissolve writ of sequestration, stipulation of counsel, pleadings, and oral argument in First City Court.

March 16, 1972, judgment entered dismissing defendant's motion to dissolve the writ of sequestration.

March 16, 1972, request for written opinion entered by defendant.

March 16, 1972, reasons for judgment issued by First City Court.

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

March 20, 1972, defendant's notice of intention to apply for writs to the Court of Appeal, Fourth Circuit, State of Louisiana filed in First City Court.

March 21, 1972, defendant's petition to the Fourth Circuit for supervisory writs filed.

March 27, 1972, plaintiff's opposition with memorandum filed in Fourth Circuit.

March 28, 1972, judgment of Fourth Circuit entered, refusing petition of defendant.

April 13, 1972, defendant's notice of intention to apply for supervisory writs to the Louisiana Supreme Court filed in First City Court.

April 20, 1972, defendant's petition to the Louisiana Supreme Court for supervisory writs filed.

April 26, 1972, plaintiff's opposition with memorandum filed in Louisiana Supreme Court.

September 29, 1972, defendant's original brief to the Louisiana Supreme Court.

November 6, 1972, opinion and judgment of the Supreme Court of Louisiana entered, affirming lower court decision.

November 21, 1972, defendant's petition for rehearing to the Louisiana Supreme Court filed.

December 11, 1972, judgment of Louisiana Supreme Court entered, refusing to consider petition of defendant for rehearing.

February 5, 1973, defendant's petition for writ of certiorari docketed by the United States Supreme Court.

May 14, 1973, defendant's petition for writ of certiorari and motion to proceed *In Forma Pauperis* granted by the United States Supreme Court.

FIRST CITY COURT FOR THE CITY OF NEW ORLEANS
STATE OF LOUISIANA

Number: 148-848

[Filed: Feb. 2, 1972, /s/ [Illegible], Deputy Clerk]

W. T. GRANT COMPANY

VS.

LAWRENCE MITCHELL

The petition of W. T. GRANT COMPANY, plaintiff herein, a New York corporation, domiciled and/or doing business in the CITY OF NEW ORLEANS, with respect shows:

1. LAWRENCE MITCHELL, of legal age and a resident of ORLEANS PARISH, is indebted unto your petitioner in the full sum of $574.17 together with legal interest thereon from judicial demand, until paid.

2. Petitioner sold and delivered unto said defendant

8/5/69	One Bradford Refrigerator and One Bradford Range		$427.21
1/23/71	One Used Stereo	$52.95	
4/9/71	One Bradford Washer	$264.95	

on (See Above), against the purchase price of which there is still past due and owing $574.17, as shown by the intemized statement hereto annexed, no part of which has been paid.

3. Defendant is not in the armed service of the United States or its allies.

4. Petitioner has a vendor's lien and privileges on the said merchandise, and fears that said defendant will encumber or alienate same during pendency of these proceedings, and that a writ of sequestration is necessary to protect plaintiff's interest in the matter.

WHEREFORE, petitioner prays for citation to defendant, and after due proceedings had, for judgment in

its favor and against defendant in the amount of $574.17, with legal interest thereon from due date, and all costs of these proceedings; that a writ of sequestration issue herein ordering the Constable of this court to sequester the above described merchandise; that in the judgment rendered herein petitioner's vendor's lien be recognized and maintained.

And for all general and equitable relief, etc.

FAVRET AND FAVRET

By /s/ Marshall J. Favret
MARSHALL J. FAVRET
Attorneys for Petitioner
527 Hibernia Bank Building
New Orleans, Louisiana
70112
Telephone: 522-9721

DEFENDANT'S ADDRESS:

7611 Chef Menteur Highway
Apartment A-10
New Orleans, Louisiana 70126

STATE OF LOUISIANA
PARISH OF ORLEANS

Jerry Dunnegan, sworn, says that he is Credit Manager of plaintiff herein; that all of the facts contained in the foregoing petition are true and correct; that petitioner has reason to fear and believe that the said defendant, Lawrence Mitchell will encumber, alienate or otherwise dispose of the merchandise described in the foregoing petition during the pendency of these proceedings, and that a writ of sequestration is necessary in the premises.

/s/ Jerry Dunnegan
JERRY DUNNEGAN

Sworn to and subscribed before me this 2nd day of Feb., 1972.

/s/ J. Paul Demares
Notary Public

ORDER

Let, as prayed for, a writ of sequestration issue herein, and let the Constable of this court sequester and take into his possession the articles of merchandise described in the foregoing petition, upon plaintiff furnishing bond in the amount of $1,125.00 dollars.

New Orleans, Louisiana, this 2nd day of February, 1972.

/s/ Arthur J. O'Keefe
Judge

BOND FOR WRIT OF ATTACHMENT AND SEQUESTRATION

STATE OF LOUISIANA
FIRST CITY COURT OF NEW ORLEANS

No. 148-848

W. T. GRANT COMPANY

vs.

LAWRENCE MITCHELL

KNOW ALL MEN BY THESE PRESENT, That we Jerry Dunnegan of W. T. Grant Company as principal and Anthony J. Russo as surety of the City of New Orleans and State of Louisiana, are held and firmly bound unto Clerk of Court, First City Court for the City of New Orleans his successors in said office in the sum of $1,125.00 Dollars money of the United States of America for which payment, well and truly to be made to the said Clerk of Court, First City Court for the City of New Orleans or his successors, we bind ourselves, in solido, and each of our executors, administrators, heirs and assigns, firmly by these presents.

Signed and dated the 2nd day of Feb., 1972.

WHEREAS, the said W. T. Grant Company has this day obtained an order from the First City Court for the City of New Orleans, ordering a writ of Sequestration to issue herein in the suit entitled W. T. Grant Company vs. Lawrence Mitchell, No. ———.

Now, the condition of the above obligation is that we, the above bound principal and surety, will well and truly pay to said parties aforesaid, for the benefit of any and all persons interested in said suit, all such damages as

may be recovered against us, in case it should be decided that the said writ was wrongfully obtained.

W. T. Grant Company

By /s/ Jerry Dunnegan
JERRY DUNNEGAN

/s/ Anthony J. Russo
ANTHONY J. RUSSO

AFFIDAVIT OF SURETY

Anthony J. Russo being duly sworn, says that he is worth over and above all his debts and obligations the sum of $1,125.00 Dollars in assets that can be subjected to levy under execution, and that he resides in the Parish of Orleans.

/s/ Anthony J. Russo
ANTHONY J. RUSSO

Sworn to and subscribed before me this 2 day of Feb., 1972 A.D.

/s/ J. Paul Demares

AFFIDAVIT OF PRINCIPAL

Jerry Dunnegan being duly sworn, says that he is informed and believes that Anthony J. Russo the surety on this bond, is worth over and above his debts and obligations in assets that can be subjected to levy under execution, the amount for which he has bound himself in this bond.

W. T. Grant Company

By /s/ Jerry Dunnegan
JERRY DUNNEGAN

Sworn to and subscribed before me this 2 day of Feb., 1972 A.D.

/s/ J. Paul Demares

Filed ....., 1972, ...
Deputy Clerk.

Favret and Favret, Attorneys
WRIT OF SEQUESTRATION

STATE OF LOUISIANA

First City Court of the City of New Orleans

To The Constable of the First City Court of the City of New Orleans

Greeting:

YOU ARE HEREBY COMMANDED TO SEQUESTER in the name of the State of Louisiana and of the First City Court of the City of New Orleans.

Suit No. FC 148-848
Section ——— Docket No. 3

W. T. GRANT COMPANY

versus

LAWRENCE MITCHELL

WHEREAS, W. T. Grant Company hath this day declared on OATH that Lawrence Mitchell who resides in this city, 7611 Chef Menteur Highway, Apt. A-10 is truly and justly indebted to W. T. Grant Company petitioner herein, in the full sum of Five Hundred Seventy Four and 17/100 $574 Dollars 17/100 cents with interest from judicial demand until paid, plus (—%) attorney's fees, and for all costs. And that the Constable of the First City Court of the City of New Orleans, seize the following property to-wit:

ONE BRADFORD REFRIGERATOR

ONE BRADFORD RANGE

ONE USED STEREO

ONE BRADFORD WASHER

AND that he has good cause to fear and does fear that the said above articles will be removed from the jurisdiction of this Court during the pendency of this suit.

YOU ARE, THEREFORE, COMMANDED TO SEQUESTER THE ARTICLES AS ABOVE DESCRIBED and to take the same into your possession until further order of this Court.

WITNESS MY HAND, this 2nd day of February 1972

/s/ L. Francis, Deputy Clerk.

Favret and Favret, Attys.

CITATION

FIRST CITY COURT OF THE CITY OF
NEW ORLEANS
STATE OF LOUISIANA

No. FC 148-848 Section Docket 3

W. T. GRANT COMPANY

vs.

LAWRENCE MITCHELL

TO: LAWRENCE MITCHELL
7611 CHEF MENTEUR HIGHWAY
APARTMENT A-10

YOU ARE HEREBY CITED to comply with the demand contained in the petition of which a certified copy accompanies this citation, either by filing a pleading or make an appearance in The First City Court of The City of New Orleans, State of Louisiana, the address of which is The Civil Courts Building, 421 Loyola Avenue, New Orleans, Louisiana, within five days (exclusive of legal holidays) after the service hereof under penalty of default.

WRIT OF SEQUESTRATION FILED HEREIN.
AFFIDAVIT, ORDER AND BOND FILED.

Witness the Honorables ARTHUR J. O'KEEFE, JR., DOMINIC C. GRIESHABER, MARION G. SEEBER, Judges of the said Court.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of The First City Court of The

City of New Orleans, State of Louisiana, this 2nd day of Feb. in the year of our Lord 1972:

NAT GROS, Clerk of The
First City Court of the
City of New Orleans, State of Louisiana

by /s/ L. Francis
Deputy Clerk

Clerk's Office, Room 201, Civil Courts Building
421 Loyola Avenue, New Orleans, Louisiana

FIRST CITY COURT FOR THE CITY OF
NEW ORLEANS
STATE OF LOUISIANA

No. 148-848 Section "A" Docket No. 3

W. T. GRANTS

vs.

LAWRENCE MITCHELL

Filed: 3-3-72 /s/ JZ Deputy Clerk

MOTION TO DISSOLVE
WRIT OF SEQUESTRATION

Now into court through undersigned counsel comes Lawrence Mitchell and moves that the Writ of Sequestration issued herein on February 2, 1972, be dissolved for the following reasons:

1. The writ of sequestration issued herein concerns property of defendant which is exempt from seizure by any process whatsoever under LSA-R.S. 13:3881; specifically exempt is the refrigerator, stove, and electric wash tub.

2. On February 7, 1972, defendant's stove, refrigerator, and electric wash tub were seized pursuant to said writ of sequestration.

3. Defendant received no notice prior to the seizure nor was he afforded an opportunity to defend his right to the personal property prior to the seizure in violation of the Due Process Clauses of the Louisiana and United States Constitutions.

4. The stove, refrigerator, and electric wash tub seized deprived defendant, his wife, and their three children of basic necessities required for safe, sanitary, and decent living in the city of New Orleans. Because of defendant's low income, he and his family have not been able to acquire substitutes for these items seized.

5. Defendant reserves his right to damages for wrongful seizure in his reconventional demand.

6. Defendant further says that he is a citizen of this State and is presently domiciled in the Parish of Orleans, and that because of his poverty and want of means he is unable to make prior payment or costs of these proceedings as they accrue, or to furnish security therefore and that he desires to prosecute these proceedings in accordance with the provisions of LSA-CCP 5181

WHEREFORE defendant prays that plaintiff W.T. Grant show cause why the writ of sequestration issued herein should not be dissolved and further that he be allowed to prosecute this action in forma pauperis.

/s/ Robert J. Hobbs
ROBERT J. HOBBS
Attorney for Petitioner
2643 Desire Street
New Orleans, Louisiana 70117
Phone: 944-7401

ORDER

IT IS ORDERED that the plaintiff herein show cause on the 14th day of March, 1972, why the Writ of Sequestration issued in the above captioned matter should not be resolved.

New Orleans, Louisiana
this 3rd day of March, 1972

/s/ [Illegible]
Judge

CERTIFICATE

I do hereby certify that a copy of the foregoing has been served upon opposing counsel this 3 day of March, 1972 via U.S. Mail, postage prepaid.

ROBERT J. HOBBS

Issued 3-3-72
/s/ VMA

Please Serve:

Marshall J. Favret
527 Hibernia Bank Bldg.
New Orleans, La. 70112

FIRST CITY COURT
PARISH OF ORLEANS
STATE OF LOUISIANA

Section "A"

No. 148-848

W. T. GRANT COMPANY

vs.

LAWRENCE MITCHELL

APPEARANCES:

FAVRET & FAVRET

By Marshall Favret, Esq., for the plaintiff

ROBERT J. HOBBS, For the defendant

Stipulation heard before the Honorable Arthur J. O'Keefe, Jr., Judge presiding over Section "A" of the First City Court for the Parish of Orleans, State of Louisiana on March 14, 1972.

BY MR. FAVRET:

It is stipulated that the vendors lien did exist on the items.

I, William B. Kitchen, Jr., an Official Court Reporter, do hereby certify that the preceding transcript is a true and correct copy of the stipulation given in the preceding matter on the 14th day of March, 1972.

/s/ William B. Kitchen, Jr.
WILLIAM B. KITCHEN, JR.
Official Court Reporter

FIRST CITY COURT FOR THE
CITY OF NEW ORLEANS
STATE OF LOUISIANA

SECTION "A"

No. 148-848 Docket 3

W. T. GRANT COMPANY

vs.

LAWRENCE MITCHELL

JUDGMENT

This matter came for trial on March 14, 1972, on a Motion filed by defendant, Lawrence Mitchell, to dissolve the Writ of Sequestration previously issued herein.

PRESENT: MARSHALL J. FAVRET, Counsel for Plaintiff
ROBERT J. HOBBS, Counsel for Defendant.

When, after examining the pleadings, considering the joint stipulation of counsel, and the oral argument, for the reasons orally assigned;

IT IS ORDERED, ADJUDGED AND DECREED, that there be judgment herein in favor of plaintiff, W. T. GRANT COMPANY, and against defendant, LAWRENCE MITCHELL, dismissing defendant's Rule to Dissolve the Writ of Sequestration previously issued herein.

THIS DONE AND SIGNED on this 16 day of March, 1972, at New Orleans, Louisiana.

/s/ Arthur J. O'Keefe, Jr.
Judge

FIRST CITY COURT FOR THE
CITY OF NEW ORLEANS
STATE OF LOUISIANA

SECTION "A"

No. FC 148-848 Docket 3

W. T. GRANT COMPANY

vs.

LAWRENCE MITCHELL

REASONS FOR JUDGMENT

Defendant filed before this Court a motion to dissolve a Writ of Sequestration and to proceed in Forma Pauperis. On separate hearing of these matters, both motions were denied.

Regarding the question of the right to proceed in Forma Pauperis, the Court is of the opinion that defendant is of sufficient means to prosecute a claim of this nature. Considering the amount of court costs involved, the Court does not feel that an undue or unreasonable burden is placed upon defendant by the denial of his motion. Admittedly, defendant is experiencing severe financial difficulties, however, the Court does not envision that the provisions of LSA-CCP 5191 encompass a poverty situation such as was presented by defendant in these proceedings.

On his motion to dissolve the Writ of Sequestration, defendant set forth as grounds for same two separate issues:

1) That the Writ of Sequestration was executed against property which is specifically exempt from such process under the provisions of LSA-R.S. 13: 3881.

2) That the provisional seizure denied defendant due process under law as provided by the Louisiana and United States Constitutions.

On the first question, the Court is of the opinion that the items seized are not exempt from seizure in instances involving a Vendor's Lien and Privilege. The Court is of the opinion that the Vendor's Lien and Privilege is a basic and essential right afforded a creditor under our law of Obligations. The right to provisional seizure is likewise a basic adjunct and necessary remedy to maintain and enforce the creditor's lien and privilege.

The Court is of the opinion that the provisional seizure enforced through sequestration was not a denial of due process and, in this instance, did not impinge upon defendant's constitutional rights. To the contrary, plaintiff insured defendant's right to due process by proceeding in accordance with Louisiana Law as opposed to any type of self-help seizure which would have denied defendant possession of his property without due process.

For the above reasons, the motion filed herein was denied.

/s/ Arthur J. O'Keefe, Jr.
Judge

APPLICATION FOR WRITS

COURT OF APPEALS, FOURTH CIRCUIT
STATE OF LOUISIANA

No. 5225

March 21, 1972
/s/ J. M. Wever, Clerk.

W. T. GRANT COMPANY

versus

LAWRENCE MITCHELL

In Re LAWRENCE MITCHELL

APPLYING FOR WRITS OF PROHIBITION, CERTIORARI, MANDAMUS AND REVIEW, DIRECTED TO THE HONORABLE ARTHUR J. O'KEEFE, JUDGE, FIRST CITY COURT OF THE CITY OF NEW ORLEANS, NO. 148-848

Robert J. Hobbs, 2643 Desire Street, New Orleans, La., 70117, 944-7401, Attorneys for Relator.

Marshall Favret, Room 527, Hibernia Bank Bldg., New Orleans, La., 70112, 522-9721, Attorneys for Respondents.

March 28, 1972—WRIT REFUSED

On the showing made by relator and respondent we find no abuse of discretion or other error in the rulings complained of. In connection with the ruling on the Forma Pauperis question see C.C.P. 5182, especially regarding the relatively small amount of court costs (approximately $11.00) which now otherwise would have to be paid. The application is denied.

/s/ P.E.C.
Judge Paul E. Chasez

/s/ L. J. S.
Judge L. Julian Samuel

3/28/72

I am of the opinion that the writ should be granted on the question of the refusal of the trial judge to permit relator to proceed in forma pauperis. See LSA-R.C. 13:3881.

/s/ [Illegible]

A TRUE COPY

New Orleans, Mar. 28, 1972

/s/ J. M. Wever, Clerk
Court of Appeals,
Fourth Circuit

SUPREME COURT OF LOUISIANA

No. 52,388

W. T. GRANT COMPANY

vs.

LAWRENCE MITCHELL

On Writ of Review to the Court of Appeal,
Fourth Circuit, Parish of Orleans

SUMMERS, Justice.

Lawrence Mitchell purchased a refrigerator, range, stereo and washer from W. T. Grant Company (Grant) on an installment sales contract. When he defaulted in his payments, Grant instituted this suit in the First City Court of New Orleans for $574.19, the balance due on the contract.

Grant alleged its entitlement to "a vendor's lien and privilege" on the merchandise and that it "fears that said defendant will encumber or alienate same during the pendency of the proceeding. . . ." Accordingly, Grant alleged, the issuance of a writ of sequestration was necessary to protect its interest. La. Code Civ. P. art. 3501, 3571.

In an attached affidavit Jerry Dunnegan, Grant's Credit Manager, verified the facts of the petition and affirmed that petitioner "has reason to fear and believe that the said defendant, Lawrence Mitchell, will encumber, alienate or otherwise dispose of the merchandise . . . during the pendency of these proceedings, and that a writ of sequestration is necessary. . . ." La. Code Civ. P. art. 3501.

Dixon, J. concurs in the result, but is of the opinion that Young v. Geter, 185 La. 709, 170 So. 240, is *contra* and should be overruled. Young v. Geter gives too narrow a construction to Article 1, Section 11 of the Louisiana Constitution.

BARHAM, J., dissents for reasons assigned by TATE, J.

TATE, J., dissents and assigns written reasons.

The Judge of the City Court signed an order for the issuance of a writ of sequestration upon plaintiff furnishing bond in the amount of $1,125. La. Code Civ. P. art. 3574. On the same day bond was furnished, February 2, 1972, the writ of sequestration issued, and Mitchell was cited to answer within five days. On February 7, 1972 Mitchell's stove, refrigerator and electric wash tub were provisionally seized pursuant to the writ of sequestration.

Thereafter, on March 3, 1972, Mitchell's counsel filed a motion to dissolve the writ of sequestration, alleging that the refrigerator, stove and electric wash tub were exempt from seizure by any process whatsoever under Section 3881 of Title 13 of the Revised Statutes. The motion to dissolve was also based upon the assertion that Mitchell was denied due process of law in that he received no notice prior to the provisional seizure under the writ of sequestration nor was he afforded an opportunity to defend his rights to the personal property prior to the seizure. Mitchell also alleged his poverty and want of means and sought to proceed in forma pauperis as authorized by Article 5181 of the Code of Civil Procedure.

Mitchell's motion to dissolve and the application to proceed in forma pauperis were denied by the judge a quo, and a subsequent application for review to the Court of Appeal, Fourth Circuit was also denied. We granted review on Mitchell's application.

I.

Section 3881 of Title 13 of the Revised Statutes exempts from seizure the stove, wash tub and refrigerator "under any writ, mandate, or process whatsoever".[1] This

[1] La. R.S. 13:3881:

"The following income or property of a debtor is exempt from seizure under any writ, mandate, or process whatsoever:

* * * *

"(4) The clothing, bed, bedding, bedstead, linen, china, glasses, knives, forks, spoons, dining table and chairs, cooking stove, kitchen

section was added to the revised Statutes by Act 32 of 1960 to replace Article 644 of the Code of Practice [2] when the latter was repealed, having been superseded by the Code of Civil Procedure. See Act 15 of 1960.

After its inclusion in the Revised Statutes, Section 3881 was amended in 1961 to remove all doubt that the wages, salaries, and other compensation of public employees and contractors were subject to garnishment. The second reason was to effectuate the recommendation of the Louisiana Sheriff's Association that the refrigerator used in a debtor's household be exempted from seizure. Act 25 of 1961; Comments by Henry G. McMahon to Section 3881. In all other respects the subject matter of Article 644 of the Code of Practice was unchanged by Section 3881.

This conclusion is further confirmed by the inclusion of Section 3881 in Chapter 18 of Title 13 of the Revised Statutes dealing with seizures in general. This chapter also contains enactments pertaining to execution of judgments under a writ of fiera facias; whereas a separate chapter (Chapter 20) in the same title collects the sec-

---

utensils, pressing irons, washtubs, and refrigerator (electric or otherwise) used by him or a member of his family; the family portraits; his arms and military accoutrements; the musical instruments played or practiced on by him or a member of his family; and the poultry and fowl kept by him for the use of his family."

* * * *

[2] La. Code of Practice, art. 644:

"The sheriff or constable can not seize the linen and clothes belonging to the debtor or his wife, nor his bed, bedding or bedstead, nor those of his family, nor his arms and military accoutrements, nor the tools and instruments and books and sewing machines, necessary for the exercise of his or her calling, trade or profession by which he or she makes a living; nor shall he, in any case, seize the rights of personal servitude, of use and habitation, of usufruct to the estate of a minor child, nor the income of dotal property, nor the cooking stove, and utensile of said stove, nor the plates, dishes, knives and forks, and spoons, nor the dining table and dining chairs, nor washtub, nor smoothing irons and ironing furnaces, nor family portraits belonging to the debtor, nor the musical instruments played on or practiced on by any member of the family, nor any poultry or fowls beloning to the debtor for family use."

tions pertaining to provisional remedies (attachment, sequestration, etc.). If the compilers of the Revised Statutes, and the Legislature, intended that the exemptions of Section 3881 should apply to provisional remedies, it would have been more orderly and logical to include this section with the sections on that subject. Instead this exemption provision was included with those sections pertaining to seizures under fiera facias.

Article 644 of the Code of Practice was contained in Chapter 6, "Of The Proceedings in Execution of Judgments." Section 3 of that chapter dealt with "The Execution of Judgments Directing the Payment of a Sum of Money." Paragraph 1 of Section 3 pertained to the Writ of Fiera Facias. Article 644 falls under this heading. It is for this reason that the courts have held that Article Article 644 related to exemptions from seizure under the writ of *fieri facias* only, refusing to allow the exemption against a provisional seizure to assert a lessor's privilege. Ross v. Rosenthal, 1 Orl. App. 203 (1904), cert. denied by Supreme Court June 30, 1904; Benton v. Jarrett, No. 2136 on the Docket of the Court of Appeal, Parish of Orleans, *cert. denied.* In Stewart v. Lacoume, 30 La. Ann. 157 (1878), commenting upon the effect of Article 644, this court said: "It is evident that the exemptions of property from seizure provided for by Art. 644 C.P. and by the Acts of 1872 and 1874, do not apply in favor of the lessees as against their lessors."

These results were based upon the proposition that the lessor's privilege established by Article 2705 of the Civil Code was not on the same subject matter as the exemptions of Article 644 "and the Code of Practice was framed exclusively with a view to judicial proceedings, and its provisions on the subject of general laws do not necessarily repeal those of the Civil Code that are contrary to, or inconsistent with them." Ellis v. Prevost, 13 La. 230 (1839). See also Kay v. Furlow, 178 La. 635, 152 So. 315 (1934); Kyle v. Sigur, 121 La. 888, 46 So. 910 (1908); Ross v. Rosenthal, 1 Orl. App. 203 (1904). In essence, the conclusion has been that exemptions from seizure under fiera facias were inapplicable to provisional remedies to assert privileges created by the Civil Code.

On this basis we hold that the exemptions allowed by Section 3881 cannot be allowed against a provisional seizure by writ of sequestration to preserve a vendor's privilege.

II.

Article 3217 of the Civil Code anounces that "The debts which are privileged on certain movables, are the following: . . . The price due on movable effects, if they are yet in the possession of the purchases. . . ."

Article 3227 elaborates:

> He who has sold to another any movable property, which is not paid for, has a preference on the price of his property, over the other creditors of the purchaser, whether the sale is made on a credit or without, if the property still remains in the possession of the purchaser. . . .

The vendor's privilege on movables exist against the property sold as a substantive right incident to the contract of sale. Johnson v. Bloodworth, 12 La. Ann. 699 (1857); State ex rel Landry v. Broussard, 177 So. 403 (La. App. 1937).

The privilege has been an integral part of the law of Louisiana since the adoption of the State's first code in 1808.[3] Its practical importance has diminished somewhat since adoption of the Chattel Mortgage Act, the latter having been enacted principally to supply the commercial deficiency of the vendor's privilege, which in general does not follow the movable when it leaves the vendee's possession. Nevertheless, the vendor's privilege remains an important and valuable right in commerce. The formality, time and expense involved in executing and recording chattel mortgages often prevent their use, particularly on small, inexpensive chattels or where the vendor neglects or is prevented from using the chattel mortgage. Daggett, *Louisiana Privileges and Chattel*

[3] La. Code of 1808, (Digest of Civil Laws Now in Force in the Territory of Orleans with Alterations and Amendments Adopted to its Present System of Government.) Bk. 3, Tit. 19, Arts. 74, subdiv. 5, and 75, subdiv. 1.

Mortgages, p. 91 (1942); Margolin, *Vendor's Privilege*, 4 Tul. L. Rev. 237 (1929).

As understood in our law, the vendor's privilege does not exist at common law. It is distinguished from the common law vendor's lien, which the vendor loses when he delivers possession of the article sold to the vendee. Daggett, id.

The privilege exists upon the sound equitable principle that when the purchaser acquires the vendor's property, his estate is enriched. "It would indeed be unjust to place an unpaid vendor on a footing of equality with other creditors of the purchaser . . . It would be iniquitous to permit the property sold to become the prey of the creditors of the purchaser without requiring, as a condition precedent, the payment of its cost. . . ." De L'Isle v. Succ. of Moss, 34 La. Ann. 164 (1882).

As defined by Laurent, Vol. XXX, p. 6, § 2; p. 18, § 16, the *raison d'etre* of the vendor's privilege is the enrichment of the purchaser's estate by the acquisition of the vendor's property. The right to the payment of the price has, therefore, always commended itself to the favorable consideration of courts.

Planiol gives this justification of the privilege:

> As long as the price is not paid the sale augments the patrimony of the buyer at the expense of the vendor; the latter has impoverished himself, he has alienated his property and has not received anything in exchange. The vendor has thus gratuitously augmented the common pledge of the creditors of the buyer; the latter can be paid with the property sold without the vendor being paid, they enrich themselves at his expense, which is unjust . . . . (Planiol, Vol. 2, No. 2608)

The privilege alone as defined by the Civil Code is of limited value. It is essentially a right without a remedy for its implementation. The machinery for its enforcement and protection is found in our procedural law. Louisiana has long recognized a need for several types of seizure before judgment. Today two are allowed: attachment and sequestration. Attachment is based upon

some act, or anticipated act, of the debtor which would place the creditor at a disadvantage in the suit and which prompts the law to protect the creditor by permitting him to seize the debtor's property pending the suit, even though the creditor has no claim against the thing seized. Sequestration involves no intent on the part of the debtor to defraud, but it is founded upon a claim to the ownership or possession or a privilege on the property seized. La. Code Civ. P. Book VII, Special Proceedings, Title I, Provisional Remedies, Chapter 1, Attachment and sequestration, Preliminary Statement.

Sequestration issues only when the grounds clearly appear by affidavit, and security is required for the payment of damages for wrongful issuance of the writ. La. Code Civ. P. 3501. It issues on the claim of ownership, right of possession or a mortgage, lien or privilege of it is within the power of the defendant to conceal, dispose of, or waste the property or the revenues therefrom, or remove the property from the parish during the pendency of the action. Id. art. 3571. In certain instances the court may in its own motion order the sequestration of property where the ownership is in dispute. Id. art. 3572. The seizure must not be excessive, id art. 3505, and the defendant may by contradictory motion obtain its dissolution unless plaintiff proves the grounds. Or defendant may obtain the release of the property upon furnishing security. Id. art. 3507. Sequestration has only the effect of preserving the property pending judgment. Id. 3510. Plaintiff's security is not released until a final judgment is rendered in his favor. Id. art. 3512.

Against this background we consider Mitchell's due process contention. It is based upon the argument that to satisfy the requirements of due process defendant is entitled to prior notice and prior hearing before seizure. The contention is principally based upon the recent decision of the United States Supreme Court in Fuentes v. Shevin, —— U.S. ——, 92 S. Ct. 1983, 1972, and its companion case. There appellants were purchasers of household goods under conditional sales contracts. They challenged the prejudgment replevin provisions of the Florida and Pennsylvania law.

The Court declared these statutes worked a deprivation of property without due process of law insofar as they denied the right to a prior opportunity to be heard before chattels are taken from their possessor. However, in its reasons the Court said, "There may be cases in which a creditor could make a showing of immediate danger that a debtor will destroy or conceal disputed goods."

This clearly announced exception to the ruling, we feel, exists in the instant case. Aside from the quoted allegations of the petition and averments of attached affidavits, there is the irrefutable inference that the vendee has, by the act of buying itself, consented to the preservation of the vendor's privilege.

A purchaser can only be excused from the effects of the vendor's privilege by saying he was ignorant of its implications. To sanction such an excuse violates the most fundamental of all legal principles and negates law at its source. It is only one step from the conclusion that the purchaser is presumed to know the law to say that when the purchaser acquires property subject to the vendor's privilege, he is held to be cognizant of the remedies such a privilege affords to the vendor and the ancillary obligations of the purchaser. One of these remedies is the right to sequestration where the purchaser has defaulted in his payments.

Under Louisiana law, therefore, the purchaser's possession is precarious to this extent: He holds possession with the implied-in-law knowledge that he has acquired the right to possession, subject to the vendor's paramount right to seize the property without hearing should he default in his payments. This seizure, the law ordains, must be with security in favor of the debtor and can only continue until a final adjudication of the rights of the parties. In effect, when the purchaser acquires movables he consents to the privilege and its enforcement provisionally.

The vendor's privilege differs from the common law conditional sale in that in the conditional sale, the vendor retains title, and he does not lose his right to recover the property after it leaves the possession of

the vendee. It is different with the vendor's privilege. The vendor's privilege is lost when the vendee divests himself of possession. The prejudgment seizure is the only effective device which will preserve the vendor's rights against a reluctant debtor, pending the protracted delay incident to obtaining judgment. Sequestration is simply a device to which the parties to the sale have, in effect, agreed whereby the property may be preserved for the mutual benefit of the parties pending a determination of their rights.

The law of vendor's privilege in this state operates to favor the vendor and vendee alike. The long history of vendor's privilege in Louisiana demonstrates that it enables the purchaser to acquire property he may otherwise be unable to buy as much as it induces the vendor to sell. Without the benefits accorded the vendor, it may well be concluded that in a substantial number of instances the possession and title to property would not be surrendered to prospective purchasers. Because of it, many impecunious citizens are enabled to acquire property to foster for their livelihood and provide for their sustenance.

We can discern no violation of due process rights when the purchaser is fully informed by law of the remedies which may be invoked as an incident of the sale.

II.

Finally, Mitchell complains that he has not been permitted to proceed in forma pauperis. He maintains he is indigent and entitled to the privilege of litigating without the prior payment of costs (La. Code Civ. P. art. 5181), because, according to his brief, he earns only $70 per week. He maintains this low income, coupled with the need to support a wife and three children, creates such a hardship that he cannot afford to pay the costs.

There is no record evidence to support the claim other than the general statements in his affidavits accompanying the motion to dissolve to the effect that he is unable to pay costs because of his poverty. This is not sufficient to overcome the presumption of correctness attaching to the judge's order which denied Mitchell the right to proceed in forma pauperis. Nevertheless, since we are

remanding this case to be proceeded with on its merits, we shall afford Mitchell an opportunity to make up a proper record on this forma pauperis.

For the reasons assigned, the ruling of the trial judge rejecting the motion to dissolve the writ of sequestration is affirmed, and the case is remanded to the trial court for further proceedings in accordance with law and the views herein expressed. The assessment of costs is to await the final outcome of the case.

REHEARING REFUSED Dec. 11, 1972

SUPREME COURT OF LOUISIANA

No. 52,388

W. T. GRANT COMPANY

versus

LAWRENCE MITCHELL

On Writ of Review to the Court of Appeals, Fourth Circuit, Parish of Orleans

TATE, Justice (concurring in part and dissenting in part).

I fully concur in Parts II and III of the excellent majority opinion. However, on the basis of current legislative enactments and judicial interpretations, I cannot subscribe to the holding that a debtor's cooking stove and refrigerator are not expressly exempt from seizure under La.R. S. 13:3881.[1]

This enactment is found within Title 13 ("Courts and Judicial Procedures") of the Louisiana Revised Statutes. It is found in Chapter 18 thereof, entitled "Seizures in General", La.R.S. 13:3881 exempts specified income or property "from seizures under any writ, mandate, or process *whatsoever*."

There is thus no statutory warrant for holding La. R.S. 13:3881, providing for exemptions from seizure under "*any* writ, mandate, or process *whatsoever*", applicable only to seizures under writs of fi.fa. Nor is there any practical reason for the distinction.[2]

---

[1] The stereo simultaneously seized is not exempt from seizure under the statute; the washing machine may be, if it is within the exemption of "washtubs". See footnote 3 below.

[2] Here the seizure was under a writ of sequestration, a conservatory writ permitting provisional seizure of the property "during the pendency of the action", La.C.Civ.P.Art. 3571, i.e., before judgment. The property thus temporarily seized cannot be sold until there is final judgment, recognizing the sequestration. La. C.Civ.P.Art. 3510,

The exemption statute in question was enacted in 1960 in connection with the repeal of the old 1961 Code of Practice, especially Article 644 thereof. As did that former Article, the 1960 statutory provision exempts from seizure a major proportion of a debtor's wages, the tools and instruments by which he earns a living, and (pertinently) certain minimal household goods necessary to save a debtor from being without the means to eat or sleep.[3] This statute unambiguously exempts from any seizure the present debtor's stove and refrigerator.

The writer initially believed that, despite this exemption from seizure, it did not apply to debts "for the purchase price of property or any part of such purchase price", by reason of Article 11, Section (4), La. Constitution of 1921. See Footnote 4 below. However, this court expressly rejected a similar contention in Young v. Jeter, 185 La. 709, 170 So. 240, 107 ALR 608 (1936), a lead case. See also Grayson v. Gray, 207 So.2d 916 (La.App.2d Cir. 1968) to the same effect; cf. also, Mounger v. Ferrell, 11 So.2d 56 (La.App.2d Cir. 1942).

In *Young* v. *Jeter* a landlord sought to enforce his lessor's privilege against certain property used by the tenant to earn his livelihood. Just as is the property

---

after which the property must be seized and sold under the writ of fi.fa See Hancock Bank v. Alexander, 256 La. 643, 237 So.2d 669, 673 (1970) and Official Revision Comment (b) to Article 3510. Thus, under the majority's interpretation, a debtor cannot claim the exemption from temporary seizure but, under La.R.S. 13:3881, he may do so to prevent the sale of the exempted property when a writ of fi.fa. issues in execution of the judgment. Aside from harassing the debtor by depriving him of the *temporary* use of his beds, bedding, kitchen stove, etc., the creditor thus is not permitted to seize and sell the property to satisfy the claim against it.

[3] See La.R.S. 13:3881, exempting from seizure by "any writ, mandate, or process whatsoever: * * * 4. The clothing, bed, bedding, bedstead, linen, china, glasses, knives, forks, spoons, dining table and chairs, cooking stove, kitchen utinsels, pressing irons, washtubs, and refrigerator (electric or otherwise) used by him or a member of his family; the family portraits; his arms and military accoutrements; the musical instruments played or practiced on by him or a member of his family; and the poultry and fowl kept by him for the use of his family."

presently seized, the tools there seized were exempt from seizure under the predecessor provision (Article 644, Louisiana Code of Practice of 1870) to La. R.S. 13:3881 (2). This court expressly rejected the contention that provisions of Article XIX, Section 2 [4] applied so as to nullify the statutory exemption from seizure of property subject to the landlord's privilege. The court expressly held that the cited constitutional provision applied only to invalidate the claim of a right to the homestead exemption established by Article 11, Section 1, of the constitution—an exemption concededly not at issue here.

In refusing to hold the statutory exemption invalid against the claim of the lessor's privilege (a claim based like the vendor's privilege upon our Civil Code and the valid commercial and equitable purposes thereby embodied), this court expressly stated, 170 So. 242: "In order to advance the humane purpose of preserving to the unfortunate debtor and his family the means of obtaining a livelihood and thus prevent him from becoming a charge on the public, it has become an almost universal rule that statutes creating an exemption should receive a liberal construction in favor of the debtor."

The ruling in *Young* v. *Jeter* is controlling here. The broad statutory exemption to a debtor of minimal household furniture necessary for him to eat and sleep must be respected by the courts. As there stated, 170 So. 241, "the state has an interest . . . that families shall not be deprived by extravagance or misfortune of shelter and comforts necessary to health and activity."

There is simply no legislative or constitutional exception from this exemption now in effect. However, salutary the purposes of the legislatively created vendor's privilege, "it is hornbook law" that the legislatively created privilege may be legislatively made subject to "such exemptions and limitations" as the legislature sees fit. Young v. Jeter at 170 So. 242.

---

[4] The constitutional article provides that "this exemption" does not apply to debts "1. For the purchase price of property or any part of such purchase price. . . . 5. For rent which bears a privilege upon said property.

Arguably, perhaps, former Code of Practice Article 845 (1870; as amended in 1924) did provide a statutory basis for a claim that the statutory exemption from seizure did not apply to debts for the purchase price. See Ferrell v. Jena Auto. Co., 16 So.2d 548 (La.App.2d Cir. 1943). However, Article 845 of the Code of Practice was repealed by the enactment of the 1960 Code of Civil Procedure. No subsequent enactment was afforded even the shadow of a basis for claiming that the statutory exemption from seizure of minimal household goods must not be respected by the courts.

The courts are not empowered to supply an exception to the broad exemption provided by the legislature in La.R.S. 13:3881, however equitable or wise we may deem such an exception. Perhaps the legislature in its discretion and wisdom may modify such exemption law, in the same manner as former La. Code of Practice Article 845 was modified (to except certain debts, such as the purchase price, from the exemption from any seizure); but it has not yet done so. Until then, the creditor's only remedy is to secure a contractual waiver of the exemption by chattel mortgage or otherwise.

For these reasons, I must respectfully dissent.

SUPREME COURT OF LOUISIANA

NEW ORLEANS, 70112

For Immediate News Release

FROM: CLERK OF SUPREME COURT OF LOUISIANA

On the 11th day of December, 1972, the following action was taken by the Supreme Court of Louisiana in the cases listed below:

* * * *

52,388 W. T. Grant Co. v. Mitchell

NOT CONSIDERED. Not timely filed.

* * * *

SUPREME COURT OF THE UNITED STATES

No. 72-6160

LAWRENCE MITCHELL, PETITIONER

v.

W. T. GRANT COMPANY

On Petition for Writ of Certiorari to the Supreme Court of the State of Louisiana

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for a writ of certiorari be, and the same is hereby, granted.

May 14, 1973

☆ U. S. GOVERNMENT PRINTING OFFICE: 1973 508516 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 72-6160

LAWRENCE MITCHELL,

Petitioner

v.

W. T. GRANT COMPANY,

Respondent.

MOTION FOR PERMISSION TO FILE BRIEF AMICI CURIAE

AMICI CURIAE BRIEF

On Writ of Certiorari to the Supreme Court of Louisiana

M. Truman Woodward, Jr.
1100 Whitney Building
New Orleans, Louisiana 70130
Thomas B. Lemann
1424 Whitney Building
New Orleans, Louisiana 70130

OF COUNSEL
MILLING, BENSON, WOODWARD, HILLYER
& PIERSON
MONROE & LEMANN
CHAFFE, McCALL, PHILLIPS, TOLER & SARPY
JOSEPH E. LeBLANC, JR.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 72-6160

LAWRENCE MITCHELL,

Petitioner

v.

W. T. GRANT COMPANY,

Respondent.

MOTION FOR PERMISSION TO FILE BRIEF AMICI CURIAE

MAY IT PLEASE THE COURT:

The undersigned members of the Bar of this Honorable Court duly licensed to and practicing in the State of Louisiana, having read in the United States Law Week (42 L. W. 3345), excerpts from the argument of counsel in the above numbered and entitled cause and viewing with concern certain statements made in said arguments, the difficulties that this Court apparently experienced in obtaining the information that it sought and in order to remedy such possible errors and omissions to assist Your

Honors in deciding this case which is of paramount importance to the Bar and the other citizens of Louisiana, and in the absence of consent agreements from counsel of record, and in view of the fact that this cause has been argued in this Court, respectfully move the Court for permission under the unusual circumstances here existing, to file the accompanying brief in this case as amici curiae.

M. Truman Woodward, Jr.
1100 Whitney Building
New Orleans, Louisiana 70130

Thomas B. Lemann
1424 Whitney Building
New Orleans, Louisiana 70130

OF COUNSEL:
MILLING, BENSON, WOODWARD, HILLYER
& PIERSON
MONROE & LEMANN
CHAFFE, McCALL, PHILLIPS, TOLER & SARPY
JOSEPH E. LeBLANC, JR.

CERTIFICATE

I hereby certify that copies of the above Motion and of the accompanying brief have been duly served on counsel of record in this cause by transmitting the same to them by United States Mail, postage prepaid, at their record respective addresses.

, 197 .

Amicus Curiae

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1973

NO. 72-6160

LAWRENCE MITCHELL,

Petitioner

v.

W. T. GRANT COMPANY,

Respondent.

AMICI CURIAE BRIEF

MAY IT PLEASE THE COURT:

The undersigned amici curiae herewith respectfully supplement the briefs heretofore filed in this cause for the sole purpose of affording your Honors information some of which you sought (seemingly unsuccessfully) during oral argument and which we submit is crucial in the consideration of the issues presented.

1. A query by Mr. Justice Rehnquist apparently[1] elicited a response that there is no safeguard insuring "that an allegation of danger to the collateral is in fact true or is made in good faith". We submit that this answer is not wholly correct for it is well recognized in Louisiana "that the stringent process of sequestration is a remedy stricti juris, and can only be resorted to in cases authorized by the very letter of our law."[2] It is issued only by order of the judge (not an administrative officer), and then only

[1] U. S. Law Week, 42 L.W. 3345, Col.3

[2] *James Beck & Co.* v. *Brady*, 6 La. Ann. 444, 445 (1851). See also: *Donohoe Oil & Gas Co.* v. *Mack-Jourdon Co.*, 144 So. 169, 175 (La. App. 2d Cir. 1932); *Mathe* v. *Mathe*, 177 La. 579, 148 So. 884, 885 (1933); *Debaillon* v. *Ponsony*, 5 Mart. (N.S.) 42 (La. 1826) and *C. A. Barriere & Brother* v. *Feste*, 9 La. Ann. 535 (1854).

upon the creditor's furnishing security in an amount determined by the court to be sufficient to protect the defendant against any damage or loss resulting from wrongful issuance.[3] It is not unusual for the amount of the bond to be fixed in an amount in excess of the creditor's claim, as it was in this particular case.

Wrongful sequester of property, even in good faith, entitles the debtor to recover all damages sustained by him, as well as attorneys fees,[4] and a plethora of cases illustrate that strict judicial enforcement of this often substantial liability has succeeded in insuring that Louisiana lawyers use extreme caution in applying for a writ of sequestration.

2. A query by Mr. Justice White regarding the possibility that there may be no balance due on the debt was answered that this contention could only be made "at a later trial", and his question whether such a challenge could be made in a proceeding seeking dissolution of the writ brought the response that our law was unclear on the point.[5]

These statements are not correct for the debtor whose property has been sequestered need suffer only a very temporary deprivation of possession, for on simple application to the issuing court he may obtain a summary hearing to dissolve the writ by a contradictory motion without

---

[3] Arts. 3501 and 3574, Louisiana Code of Civil Procedure (hereinafter designated as "C.C.P.")

[4] Art. 3506, C.C.P., and Comment (d) thereunder. See also *General Motors Acceptance Corporation* v. *Sneed*, 167 La. 432, 119 So. 417 (1928) (humiliation, mortification, injury to social standing, injury to credit and financial standing, actual pecuniary loss, and attorney's fees, *held*, recoverable items of damage); *Talley* v. *Bradley*, 177 So. 2d 624 (La. App. 3rd Cir. 1965) (loss of profits and loss of use of movables sequestered, *held*, recoverable items of damage); *Roy D. Martin Lumber Co.* v. *Sinclair*, 220 La. 226, 56 So. 2d 240 (1951) (loss of use of property, amount paid to bondsman for release of property, attorneys fees, *held* recoverable items of damage); *American Steel Building Co.* v. *Brezner*, 158 So. 2d 623 (La. App. 3rd Cir. 1963).

[5] U. S. Law Week, 42 L.W. 3345, Col. 2.

the necessity of filing any bond.[6] At such a hearing, *the burden is upon the seizing creditor to prove* the grounds upon which the writ was issued[7]—in this case, the existence of a valid vendor's privilege—failing which, whether by reason of prematurity, payment, novation, insufficiency in pleadings, process, the bond furnished, want of jurisdiction, lack of indispensable parties, or any other legal reason, the writ is dissolved, the property returned to the debtor, and his right to sue for damages and attorney's fees reserved to him. This effectively corrects the statement made to the Court that at a hearing to quash the seizure there is only "an inquiry into the probable validity of the claim."[8] Rather, determined at that time is the creditor's absolute and unqualified right to the writ, which may result in a resolution of the issues on the merits. Contrary to the doubts apparently expressed by both counsel at the oral argument of this cause, the Supreme Court of Louisiana has said that it is *reversible error* to exclude evidence at the hearing on the ground that the same may also be introduced at the trial on the merits.[9]

3. The seizure effected by sequestration is provisional and conservatory only, pending final decision on the merits. Disposition of the property must await entry of personal judgment against the debtor, issuance of a writ of fieri facias (seizure and sale) and judicial sale after appraisement.

Moreover, the writ is granted only to a creditor secured by mortgage, lien or privilege,[10] such as the vendor's priv-

---

[6] Art. 3506 C.C.P.
[7] Art. 3506, C.C.P. and Comment (a) thereunder; *Chas. A. Kaufman Co. Ltd. v. Gregory*, 244 La. 766, 154 So. 2d 392, 395 (1963).
[8] 42 L.W. 3346, Col. 2.
[9] *Chas. A. Kaufman Co. Ltd. v. Gregory, supra.*
[10] Art. 3571, C.C.P.

ilege stipulated to be the foundation of the sequestration here. A "bare assertion" of right to the property, such as that in *Fuentes*, would not have authorized either the seizure in this case nor any other seizure in Louisiana.

The privilege granted the vendor under Louisiana law as security for the payment of the purchase price, has no counterpart in the common law, but is unrecorded and wholly dependent for its existence on the debtor's continued possession of the affected property.[11] It simply is not correct, as was apparently indicated in oral argument, that such a privilege can exist without there being a balance due on the purchase price.[12] The precarious nature of its tenure makes a particularly urgent claim upon a court's conservatory powers, which alone can bar clandestine disposition by a defaulting debtor. Were the property involved here to have been transferred pending the trial of this case, the creditor's vendor's privilege would have been extinguished, and its right to priority in payment from an impecunious debtor lost.

Elimination of sequestration without prior hearing would so drastically curtail the rights of Louisiana creditors, who are without benefit of the self-help provisions of the Uniform Commercial Code[13] and who retain no

---

[11] Art. 3227, Louisiana Civil Code; *W. T. Grant Company v. Mitchell*, 263 La. 627, 269 So. 2d 186 (1972); *In re: Wallace Lincoln-Mercury Company, Inc.*, 469 F. 2d 396 (5th Cir. 1972); *Thomas Y. Brent, Son & Co. v. Shouse*, 16 La. Ann. 158 (1861); Comment, "Vendor's Privilege." 4 *Tul. L. Rev.* 239 (1929-1930).

[12] 42 L.W. 3346, Col. 2.

[13] Louisiana is the only state which has not adopted the U.C.C., due in large measure to the unwillingness of Louisiana to depart from its civilian heritage by adopting the far different Arts. 2 and 9 of the U.C.C. relating to sales and security devices. See "The 1965 Bailey Lectures—A Forward", 26 *La. L. Rev.* 189 (1966) and "Proposal for Codification of the Commercial and Banking Laws of Louisiana—With the Uniform Commercial Code as a Guiding Pattern," 18 *La. Bar Journal* 251, 256 (March, 1971).

title by conditional sale,[14] that it would lessen the probability of credit sales to that segment of the populace with questionable credit.

[14] *In re: Wallace Lincoln-Mercury*, 469 F. 2d 396 (5th Cir., 1972); *Barber Asphalt Paving Co. v. St. Louis Cypress Co.*, 121 La. 152, 46 So. 193; *Tangipahoa Bank & Trust Co. v. Kent*, 70 F. 2d 139 (5th Cir. 1934).

CONCLUSION

We therefore respectfully submit that *Fuentes* is inapplicable to the facts of this case and particularly inapplicable to the unique Louisiana law that affords debtors greater protection than is elsewhere available.

Respectfully submitted,

M. TRUMAN WOODWARD, JR.
1100 Whitney Building
New Orleans, Louisiana 70130
THOMAS B. LEMANN
1424 Whitney Building
New Orleans, Louisiana 70130
Amici Curiae

OF COUNSEL:
MILLING, BENSON, WOODWARD, HILLYER & PIERSON
MONROE & LEMANN
CHAFFE, McCALL, PHILLIPS, TOLER & SARPY
JOSEPH E. LeBLANC, JR.
PETER A. FERINGA, JR.

SUPREME COURT, U. S.

FILED
JUL 23 1973

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 72-6160

LAWRENCE MITCHELL,

Petitioner,

v.

W.T. GRANT COMPANY,

Respondent.

PETITIONER'S BRIEF

ROBERT J. HOBBS
National Consumer Law Center, Inc.
One Court Street
Boston, Massachusetts 02108
Tel: (617) 523-8010

OKLA JONES, II
2643 Desire Street
New Orleans, Louisiana 70117
Tel: (504) 522-0617

JOHN W. REED
2735 Tulane Avenue
New Orleans, Louisiana 70119
Tel: (504) 822-4489

Attorneys for Petitioner

Washington, D.C. • CLB PUBLISHERS, INC. • (202) 393-0625

TABLE OF CONTENTS

	Page
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
QUESTIONS PRESENTED	2
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	5
ARGUMENT:	
I. The Louisiana Procedure of Sequestration Violates Due Process by Providing for the Deprivation by Judicial Order of Property Purchased on Credit Without Allowing the Instalment Buyer of the Property Prior Notice and Opportunity for a Hearing.	9
A. Due Process Requires That an Individual Be Afforded Notice and an Opportunity To Be Heard Prior to the Deprivation of His Property.	9
B. The Louisiana Procedure of Sequestration Allows a Credit Seller To Obtain a Judicially Authorized Seizure of Property *Ex Parte* and Without Prior Notice and Hearing to the Owner of the Property.	14
II. The Louisiana Procedure of Sequestration Does Not Come Within the Single Narrow Exception to the Requirement of Notice and Hearing Prior to the Deprivation of Property.	27
A. Notice and Hearing May Be Postponed Until After a Deprivation of Property Only in Narrowly Confined "Extraordinary Situations."	27

B. The Louisiana Sequestration Statutes Are Not Narrowly Drawn To Allow the Deprivation of Property Only Upon a Showing of Exceptional Need. 30

C. W.T. Grant Company Did Not Proceed in a Manner Which Would Cure the Facial Unconstitutionality of the Louisiana Sequestration Procedure. 39

CONCLUSION 45

APPENDIX A: Statutes 1a

APPENDIX B: Return of Constable of First City Court for the City of New Orleans 1b

APPENDIX C: Inventory of Constable of First City Court for the City of New Orleans 1c

TABLE OF AUTHORITIES

Cases:

Aetna Ins. Co. v. Kennedy, 301 U.S. 389 (1937) 31

Air Conditioning Training Co. v. Knouse, 46 So.2d 665 (La. App. 1950) 33

Amacker v. Amacker, 146 So.2d 672 (La. App. 1962) 34

American Furniture Co. v. Grant-Jung Furniture Co., 50 La. Ann. 931, 24 So. 182 (1898) 22

Anderson National Bank v. Luckett, 321 U.S. 233 (1944) 28

Armstrong v. Manzo, 380 U.S. 545 (1965) 10, 12

Baldwin v. Hale, 68 U.S. (1 Wall.) 223 (1864) 11

Barrow v. Duplantis, 147 La. 461, 85 So. 205 (1920) 19

Bartlett v. Russell, 142 So.2d 58 (La. App. 1962) 33

Bell v. Burson, 402 U.S. 535 (1971) 11, 13, 31

Berger v. DeSalvo, 156 So.2d 323 (La. App.), *writ refused*, 245 La. 86, 157 So.2d 231 (1963) 33

Best v. Humbolt Placer Mining Co., 371 U.S. 334 (1963) 28

Bickham Motors v. Crain, 185 So.2d 271 (La. App. 1966) 19

Blitz v. Guenin, 187 So. 690 (La. App. 1939) 23

Boddie v. Connecticut, 401 U.S. 371 (1971) 11, 12, 13

Boudreaux v. Allstate Finance Corp., 217 So.2d 439 (La. App. 1968) 33

Bowles v. Willingham, 321 U.S. 503 (1944) 28

Buckner v. Carmack, ___ La. ___, 272 So.2d 326 (1972), *cert. filed*, 42 U.S.L.W. 3006 (1973) 34

Carter v. Foreman, 219 So.2d 21 (La. App. 1969) 33

Centanni v. A.K. Roy, Inc., 258 So.2d 219 (La. App. 1972) 33

Central of Georgia Ry. Co. v. Wright, 207 U.S. 127 (1907) 11

Charles A. Kaufman Co. v. Gregory, 244 La. 766, 154 So.2d 392 (1963) 22

Coe v. Armour Fertilizer Works, 237 U.S. 413 (1915) .. 8, 11, 40

Coffin Brothers Co. v. Bennett, 277 U.S. 29 (1928) 28

Covey v. Town of Somers, 351 U.S. 141 (1956) 10

D.H. Overmyer Co. v. Frick Co., 405 U.S. 174 (1972) 29, 31

Edmonston v. W.T. Grant Co., 57 Misc.2d 37, 291 N.Y.S.2d 864 (N.Y. Cty. Ct. 1968) 32

Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950) 28

Fahey v. Mallonee, 332 U.S. 245 (1947) 28

Fidelity & Casualty Co. of N.Y. v. Harris-Smith, Inc., 211 So.2d 339 (La. App. 1968) 23

Fuentes v. Shevin, 407 U.S. 67 (1972) ..... *passim*

Givens v. Southern Farm Bureau Casualty Ins. Co., 197 So.2d 380 (La. App. 1967) 13

Goldberg v. Kelly, 397 U.S. 254 (1970) 11, 13, 14

Goldsmith v. U.S. Board of Tax Appeals, 270 U.S. 117 (1926) 11

Gordon Finance Co. v. Chambliss, 236 So.2d 533 (La. App.), *cert. denied,* 256 La. 869, 239 So.2d 364 (1970) 33, 45

Griffin v. Griffin, 327 U.S. 220 (1946) 10

Gueydan v. T.P. Ranch Co., 156 La. 397, 100 So. 541 (1924) 25

Hancock Bank v. W.R. Alexander, 256 La. 643, 237 So.2d 669 (1970) 16, 23

Harris v. Hardeman, 55 U.S. (14 How.) 334 (1852) 10

Helvering v. Hallock, 309 U.S. 106 (1939) 26

Hollingsworth v. Barbour, 29 U.S. (4 Pet.) 466 (1830) 10

Holmes v. W.T. Grant Co., 71 Misc.2d 486, 336 N.Y.S.2d 601 (N.Y. Sup. Ct. 1972) 32

Hovey v. Elliott, 167 U.S. 409 (1897) 11

Johnson v. W.T. Grant Co., 2 OEO Pov. L. Rep. ¶16,622 (Minn. Dist. Ct. 1973) 32

Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951) 14

Jones v. Paul, 254 So.2d 915 (La. App. 1971) 33, 45

Kosches v. Nichols, 68 Misc.2d 795, 327 N.Y.S.2d 968 (Civ. Ct., N.Y. Cty., 1971) 38

Lindsey v. Normet, 405 U.S. 56 (1972) 12

Londoner v. Denver, 210 U.S. 373 (1908) 11

M. Marx Sons v. Cooper, 63 So.2d 883 (La. App. 1953) 26, 27

Merchant's & Farmer's Bank v. Fischer Lumber Co., 136 La. 860, 67 So. 932 (1915) 22

Montagne v. Tinker, 197 So.2d 154 (La. App.), *writ refused*, 250 La. 916, 199 So.2d 921 (1967) 23

Moragne v. United States Marine Lines, Inc., 398 U.S. 375 (1970) 26

Morgan v. United States, 304 U.S. 1 (1938) 28

Mourning v. Family Publications Service, Inc., 93 S.Ct. 1652 (1973) 25

Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306 (1950) 9, 10, 12

New York v. N.Y., N.H. & H. Ry. Co., 344 U.S. 293 (1953) 10

North American Cold Storage Co. v. City of Chicago, 211 U.S. 306 (1908) 28

Ohio Bell Telephone Co. v. Public Utilities Comm'n., 301 U.S. 292 (1937) 31

Opp Cotton Mills v. Administrator, 312 U.S. 126 (1941) 11, 28

Papachristou v. City of Jacksonville, 405 U.S. 156 (1972) 26

Patterson v. Western Auto Supply Co., 125 So.2d 611 (La. App. 1961) 21

Phillips v. Commissioner, 283 U.S. 589 (1931) 28

Queen City Broadcasting Co. v. Wagenwest, Inc., 264 So.2d 336 (La. App. 1972) 22

Ralph's Fleet, Inc. v. American Marine Corp., 157 So.2d 317 (La. App. 1963) 23

Ray v. Norseworthy, 90 U.S. (23 Wall.) 128 (1875) 11

Rees v. City of Watertown, 86 U.S. (19 Wall.) 107 (1874) 11

Rex Credit Co., Inc. v. Kirsch, 4 So.2d 797 (La. App. 1941) 45

Roller v. Holly, 176 U.S. 398 (1900) 11

Ross v. Brown Title Co., 356 F. Supp. 595 (E.D. La.), *aff'd*, ___ U.S. ___, 41 U.S.L.W. 3644 (1973) 34

Schroeder v. New York, 371 U.S. 208 (1962) 12

Scott v. McNeal, 154 U.S. 34 (1894) 11

Smith v. Allright, 321 U.S. 649 (1943) 26

Sniadach v. Family Finance Corp., 395 U.S. 337 (1969) 12, 13, 14, 26, 35

Southern Ry. Co. v. Virginia, 290 U.S. 190 (1933) 11

Stanley v. Illinois, 405 U.S. 645 (1972) 31

Sun Sales Co. v. Hodges, 224 So.2d 157 (La. App.), *aff'd*, 256 La. 687, 237 So.2d 684 (1967) 27

Swarb v. Lennox, 314 F. Supp. 1091, 314 F. Supp. 1112 (E.D. Pa. 1970), *aff'd*, 405 U.S. 191 (1972) 31

The Boys Markets, Inc. v. Retail Clerks Union, 398 U.S. 235 (1970) 26

The Mary, 13 U.S. (9 Cranch) 126 (1815) 6, 10

Thomas v. Philip Werlein, Ltd., 181 La. 104, 158 So. 635 (1935) 13

Thrift Funds of Baton Rouge v. Jones, ___ La. ___, 274 So.2d 150 (La. Sup. Ct. 1973) 45

Toups v. Toups Truck & Trailer Service, Inc., 238 So.2d 200 (La. App. 1970) 34

Tucker & Schonekas v. Dohmann Chevrolet, Inc., 260 So.2d 99 (La. App.), *writ refused*, 261 La. 1048, 262 So.2d 37 (1972) 24

U.S. Dept. of Agriculture v. Murry, ___ U.S. ___, 41 U.S.L.W. 5099 (June 25, 1973) 31

United States v. Illinois Central Central R.R. Co., 291 U.S. 457 (1934) 11, 28

Vlandis v. Kline, ___ U.S. ___, 37 L.Ed.2d 63 (1973) 31

W.T. Grant Co. v. California Superior Court of Santa Barbara County, 23 Cal. App.3d 284, 100 Cal. Rptr. 179 (1972) 32

W.T. Grant Co. v. Mitchell, 263 La. 627, 269 So.2d 186 (1972) ..... *passim*

Walsh v. W.T. Grant Co., 241 A.2d 46 (N.J. Dist. Ct. 1968) 32

West Ohio Gas Co. v. P.U.C. of Ohio, 294 U.S. 63 (1935) 11

Wheeler v. Montgomery, 397 U.S. 280 (1970) 11

Willner v. Committee on Character and Fitness, 373 U.S. 96 (1963) 12

Windsor v. McVeigh, 93 U.S. (3 Otto) 274 (1876) 11

Wisconsin v. Constantineau, 400 U.S. 433 (1971) 11

Yakus v. United States, 321 U.S. 414 (1944) 28

Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969) 12

Zion Mercantile Co. v. Pierce, 163 La. 477, 112 So. 371 (1927) 18

Statutory Materials

Constitutional:

United States Constitution, Amendment XIV, §1 ..... 2, 10

Federal Statutes:

Truth in Lending Act, 15 U.S.C.A. §§1601 *et seq.* 45

28 U.S.C.A. §1257(3) 1

28 U.S.C.A. §2101(c) 2

Federal Rules:

Federal Rules of Civil Procedure, Rule 65(b) 38

Rules of United States Supreme Court, Rule 34(1) 2

State Statutes:

Louisiana Civil Code

Article 3133 17
Article 3227 . . . . . 16, 17
Article 3228 17
Article 3263 37

Louisiana Code of Civil Procedure

Article 281 19
Article 282(1) 19
Article 283(2) 7, 19
Article 325 19
Article 1092 26
Articles 2291 *et seq.* 27, 34
Articles 2411 *et seq.* 27, 34
Articles 2631 *et seq.* 15, 34
Article 2643 26
Article 3501 17
Article 3502 18
Article 3504 20
Article 3505 20
Article 3506 . . . . . 22, 44
Article 3507 20
Article 3510 . . . . . 21, 24
Article 3541 . . . . . 15, 34
Article 3571 . . . . . 15, 17, 22, 35
Article 3574 18
Article 3576 20
Articles 3601 *et seq.* 34, 38
Article 5002 21
Articles 5121 *et seq.* 18
Article 5127 20

Louisiana Chattel Mortgage Act, La. Rev. Stats. §§9:5351 *et seq.* 17, 37

Louisiana Act No. 190 of 1912 (repealed 1960) 25, 41

Other Authorities:

Comment, "Vendor's Privilege," 4 Tulane L. Rev. 239 (1930) 17

Dainow, "Vicious Circles in the Louisiana Law of Privileges," 23 La. L. Rev. 1 (1964) 37

Johnson, "Attachment & Sequestration: Provisional Remedies Under the Louisiana Code of Civil Procedure," 38 Tulane L. Rev. 1 (1963) 15, 22, 25

L'Enfant, "*Fuentes v. Shevin*: Procedural Due Process and Louisiana Creditor's Remedies," 33 La. L. Rev. 62 (1972) 15

Millar, "Judicial Sequestration In Louisiana: Some Account of Its Sources," 30 Tulane L. Rev. 201 (1956) 24, 25

Reporter's Comment (b) to La. Code Civ. Pro., Art. 282 19

Reporter's Comment (a) to La. Code Civ. Pro., Art. 3506 22

Reporter's Comment (c) to La. Code Civ. Pro., Art. 3506 ..... 24, 33

Reporter's Comment (a) to La. Code Civ. Pro., Art. 3571 ..... 25, 42

Reporter's Preliminary Statement to La. Code Civ. Pro., Arts. 3501 *et seq*. 15

A. Yiannopoulos, *Louisiana Civil Law Treatise on Property* (1967) 17, 25

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 72-6160

LAWRENCE E. MITCHELL,

Petitioner,

v.

W.T. GRANT COMPANY,

Respondent.

PETITIONER'S BRIEF

OPINIONS BELOW

The opinion of the Supreme Court of the State of Louisiana is reported at 263 La. 627, 269 So.2d 186 (A.23). The opinion of the Louisiana Court of Appeal for the Fourth Circuit is unreported and is printed in the Single Appendix at 20-21. The judgment and opinion of the First City Court for the City of New Orleans is unreported and is printed in the Single Appendix at 17-19.

JURISDICTION

The jurisdiction of this Court to review by writ of certiorari the decision of the Supreme Court of the State of Louisiana is conferred by 28 U.S.C. §1257(3). The

decision of the Supreme Court of the State of Louisiana was entered on November 6, 1972 and petition for a writ of certiorari was docketed by this Court on February 5, 1973, within the delays provided by 28 U.S.C. §2101(c) and Rule 34.1 of this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This matter involves Section One of the Fourteenth Amendment to the United States Constitution and Articles 3501, 3506, and 3571 of the Louisiana Code of Civil Procedure. The Louisiana statutes are set out verbatim along with other closely related provisions of the Louisiana Civil Code and the Louisiana Code of Civil Procedure in Appendix "A": Statutes. Section One of the Fourteenth Amendment to the United States Constitution provides:

United States Constitutional Amendment XIV

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

QUESTION PRESENTED

Whether the Louisiana procedure of sequestration violates the due process clause of the Fourteenth Amendment to the United States Constitution by

providing for the deprivation by judicial order of property purchased on credit and by failing to provide to the instalment buyer of the property prior notice and an opportunity for a hearing.

STATEMENT OF THE CASE

On February 2, 1972, W.T. Grant Co. (hereinafter "Grant" or "plaintiff"), a chain store retailer of general merchandise, initiated this action by filing a petition in the First City Court for the City of New Orleans (hereinafter "City Court") alleging $574.17 "past due and owing" upon a series of purchases of four appliances made by defendant Lawrence Mitchell (hereinafter "Mitchell" or "defendant") between August 1969 and April 1971. Grant's petition requested a judgment in the amount of $574.17 with legal interest, a recognition of Grant's "vendor's lien," and a writ of sequestration "to protect plaintiff's interest in the matter." (A.3-4, R.1, p.1).

The second page of the petition filed by Grant contained a verification of the petition, an affidavit by Grant's credit manager and an order authorizing the issuance of a writ of sequestration and requiring Grant to furnish security in the amount of $1125.00. (A.4-5, R.1, p.2). On the same day Grant filed a surety bond in the amount of $1125.00 (A.6) and three exhibits which purport to be contract forms prepared to reflect the terms of the sale. (R.3, pp.1,2,3). The record discloses no further showing to the City Court on that date.[1] Upon those documents and without any notice to Mitchell, the City Court judge signed the order authorizing the requested sequestration and the bond.

[1] The plaintiff's petition (A. 3) refers to "the itemized statement hereto annexed," but it apparently was not annexed and does not appear in the record.

On February 18, 1972, the constable of the City Court served upon Mitchell at his residence the citation (A.11-12), Grant's petition (A.3-4), and the writ of sequestration. (A.9-10). At the same time, the constable seized the refrigerator, stove, stereo phonograph and clothes washer which had been sold to Mitchell by Grant. (Petitioner's Brief, Appendix "B"). Mitchell's appliances were loaded onto Grant's truck and taken to Grant's place of storage. (Petitioner's Brief, Appendix "C").[2]

On March 3, 1972, Mitchell moved the City Court to dissolve the writ of sequestration asserting *inter alia* that the seizure of his stove, refrigerator, stereo phonograph and clothes washer without prior notice and hearing deprived him of procedural due process as guaranteed by the United States Constitution. (A.13-14). An adversarial hearing on Mitchell's motion to dissolve the writ of sequestration was set for March 14, 1972 (A.15), and Grant was notified of the hearing. (R.6, p.5).

On March 14, 1972, no evidence or testimony was introduced before the City Court judge as counsel entered into a joint stipulation: "It is stipulated that the vendor's lien did exist on the items." (A.16).

On March 16, 1972, the City Court entered its judgment denying the motion to dissolve "after examining the pleadings, considering the joint stipulation of counsel, and the oral argument. . . ." (A.17). The City Court assigned "Reasons For Judgment" which provide, in part:

---

[2]In the lower courts, counsel believed and asserted that these events had occurred on February 7, 1972. Further inquiry into the record has resulted in the discovery that the date of service and seizure was February 18, 1972. *See* Petitioner's Brief, Appendices "A" and "B".

> The Court is of the opinion that the provisional seizure enforced through sequestration was not a denial of due process and, in this instance, did not impinge upon defendant's constitutional rights. (A.18-19).

Mitchell requested the Court of Appeal for the Fourth Circuit of Louisiana to exercise its supervisory jurisdiction to review the decision of the City Court refusing to dissolve the sequestration (R.12), but the Court of Appeal denied Mitchell's application finding "no abuse of discretion or other error. . . ." (A.20-21).

On April 20, 1972, Mitchell requested the Supreme Court of Louisiana to exercise its supervisory jurisdiction to review the decision of the City Court. The Supreme Court of Louisiana granted Mitchell's request to exercise its supervisory jurisdiction on April 25, 1972. (R.16). On November 6, 1972, the Supreme Court of Louisiana affirmed the ruling of the lower courts by holding *inter alia* that there was no violation of procedural due process rights. *W.T. Grant Co. v. Lawrence Mitchell*, 263 La. 627, 269 So.2d 186 (1972). (A.22-35).

On February 5, 1973, a petition for a writ of certiorari was filed in this Court and certiorari was granted on May 14, 1973. *Mitchell v. W.T. Grant Co.*, ___ U.S. ___, 93 S.Ct. 2276 (1973). (A. 37).

SUMMARY OF ARGUMENT

Lawrence Mitchell was deprived of a refrigerator, stove, clothes washer and phonograph by a judicially authorized seizure without any advance notice and without any opportunity for a prior hearing. That seizure constituted a deprivation of property in violation of the requirements of the due process clause of the Fourteenth Amendment to the United States Constitution.

The requirement of affording notice and an opportunity for a hearing before one is deprived of property is fundamental to our concepts of justice and rooted in the power of courts to adjudicate. *The Mary*, 13 U.S. (9 Cranch) 126 (1815). The due process requirement of prior notice and hearing has allowed only one narrow exception and that exception is applicable only in the most extraordinary of circumstances. *Fuentes v. Shevin*, 407 U.S. 67, 90 (1972). The Louisiana procedure of sequestration violates the due process requirement that notice and hearing be afforded prior to the deprivation of property, and the Louisiana sequestration statutes are not narrowly tailored to come within the "extraordinary situation" exception to due process. The procedure is broadly available to every seller with regard to every credit sale in Louisiana.

The Louisiana procedure of sequestration is an *ex parte* process by which a claimant may obtain the seizure by a court officer of goods in the possession of the defendant. The seizure is predicated upon the plaintiff's interest in the property, the defendant's possession or "power" over the property, and the filing of an action by the plaintiff against the possessor of the property. La. Code Civ. Pro., Art. 3571. In addition, the plaintiff is required to file a surety bond and to verify by affidavit the grounds upon which the sequestration is based. La. Code Civ. Pro., Art. 3501. The sequestration requirement that the plaintiff have an interest in the property to be seized may be satisfied by the vendor's privilege, and the vendor's privilege is an unrecorded security device that arises in the favor of every Louisiana seller upon the sale of property on a credit basis. La. Civ. Code, Art. 3227. There are no other criteria for the *ex parte* issuance of a writ of sequestration, and the procedure is so

ordinary that Louisiana district court clerks may authorize the writ except in Orleans parish. La. Code Civ. Pro., Art. 283(2). There are no constitutionally significant distinctions between the procedure of sequestration and other procedures which have been found by this Court to violate due process.

The statutory replevin procedures of Florida and Pennsylvania found unconstitutional in the decision of this Court in *Fuentes v. Shevin* are constitutionally indistinguishable from the Louisiana sequestration procedure. However, unlike that case, in this case the defendant has full legal title to the goods which were seized, and the seller has never asserted a contractual waiver of the buyer's due process protections. As in *Fuentes v. Shevin*, the plaintiff in this case had only to make a *pro forma* showing by verified petition and conclusory affidavit to obtain the seizure. Although the seizure was authorized by a judge in this case, the authorization involved no real judicial scrutiny. Although there was a delay between the authorization of the seizure and the actual seizure, there was no attempt to notify the defendant of the authorization. Although a surety bond was required of the plaintiff, the bond may have lacked prophylactic effect as the surety could be any person and could be replaced even if proven to be of insufficient solvency in an adversarial hearing.

The only recognized grounds under Louisiana law for attacking the validity of the seizure would be the plaintiff's failure to file the action or affidavit in proper form, the plaintiff's lack of an ownership, possessory or security interest in the disputed property, or the defendant's lack of possession of the disputed property. The validity of the plaintiff's underlying claim is irrelevant to the issue of the validity of the seizure until the trial on the merits.

Thus, such issues as the defendant's liability and default as well as any defenses or counterclaims available to the defendant are not to be considered in the issuance or dissolution of the seizure. Such issues are, under Louisiana law, properly considered only at a trial on the merits and may defeat the seizure at that time. However, neither the hearing on the motion to dissolve the sequestration nor the trial on the merits meet the requirements of due process. Both occur subsequent to the actual deprivation of property and are therefore constitutionally deficient.

The statutory criteria for the issuance of a writ of sequestration are not susceptible to a narrowing construction so as to fit within the "extraordinary situation" exception to the requirements of due process. *Fuentes v. Shevin, supra* at 90-93. Sequestration serves a private and not a governmental need. Sequestration is not limited to special situations demanding prompt action. There is no effective state review or evaluation of the decision to grant a writ of sequestration. The decision of the Louisiana Supreme Court in this very case makes it clear that the threat of *ex parte* seizure by the process of sequestration exists in every Louisiana credit sales transaction. *W.T. Grant Co. v. Mitchell*, 263 La. 627, 269 So.2d 186 (1972). (A.23).

Even if it were assumed to be within the power of a private litigant to do so, the constitutional defects in the sequestration statutes were not cured by the manner in which the plaintiff proceeded. Due process requires that notice and hearing be provided by statute and not by the grace of the party employing the statute. *Coe v. Armour Fertilizer Works*, 237 U.S. 413, 422-3 (1915). However, no prior notice and hearing were afforded to the defendant. Although plaintiff requested the sequestration on the basis of an averment of "fear" that defendant will encumber, alienate,

or otherwise dispose of the goods during the suit, that averment was legally superfluous under Louisiana law to the issuance of the writ. The averment was merely *pro forma*, conclusory, legal jargon, and it was abandoned by the plaintiff at the earliest possible moment. Neither the procedure of sequestration nor the facts of this case come within any exception to the requirement of prior notice and hearing. Sequestration as provided by statute and as employed in this instance is clearly contrary to the holding of this Court in *Fuentes v. Shevin* and the long line of cases on which *Fuentes* was based.

ARGUMENT

I.

THE LOUISIANA PROCEDURE OF SEQUESTRATION VIOLATES DUE PROCESS BY PROVIDING FOR THE DEPRIVATION BY JUDICIAL ORDER OF PROPERTY PURCHASED ON CREDIT WITHOUT ALLOWING THE INSTALMENT BUYER OF THE PROPERTY PRIOR NOTICE AND OPPORTUNITY FOR A HEARING.

A. Due Process Requires That An Individual Be Afforded Notice And An Opportunity To Be Heard Prior To The Deprivation Of His Property.

From the earliest days in our constitutional history, this Court has recognized time and again that it is absolutely fundamental to our adversarial legal system that "deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 313 (1950).

As the Court stated in *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972), due process not only ensures "abstract fair play to the individual," but also minimizes "substantially unfair or mistaken deprivations of property." This doctrine of notice and opportunity for a hearing prior to seizure of property represents inherent fairness and is in harmony with basic precepts of Anglo-American jurisprudence.

This principle is so fundamental that it was promptly incorporated into the Fifth Amendment and later into the Fourteenth Amendment to the United States Constitution: ". . . nor shall any State deprive any person of life, liberty, or property without due process of law. . . ." U.S. Const. Amend. XIV, §1. Due process is so entrenched in our tradition and conscience that, in its early decisions, this Court relied upon natural law to find that an individual's right to notice and opportunity for a hearing was essential to a court's jurisdictional power to adjudicate. *See, e.g., Harris v. Hardeman*, 55 U.S. (14 How.) 334 (1852); *Hollingsworth v. Barbour*, 29 U.S. (4 Pet.) 466 (1830); *The Mary*, 13 U.S. (9 Cranch) 126 (1815).

It is also well established that the opportunity to be heard required by due process "must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). As has been asserted in a consistent line of cases stretching back over a hundred years, in order to be constitutionally "meaningful," the opportunity to be heard must precede any actual deprivation of private property. *Covey v. Town of Somers*, 351 U.S. 141 (1956) (tax lien forclosure); *New York v. N.Y., N.H. & H. Ry. Co.*, 344 U.S. 293 (1953) (creditor's claims against a bankrupt); *Mullane v. Central Hanover Bank and Trust Co., supra* (settlement of a common trust fund); *Griffin v. Griffin*,

327 U.S. 220 (1946) (accrued alimony judgment); *Opp Cotton Mills v. Administrator*, 312 U.S. 126 (1941) (minimum wages); *West Ohio Gas Co. v. P.U.C. of Ohio*, 294 U.S. 63 (1935) (gas rates); *United States v. Illinois Central R.R. Co.*, 291 U.S. 457 (1934) (railroad rates); *Southern Ry. Co. v. Virginia*, 290 U.S. 190 (1933) (administrative termination of a railroad grade crossing); *Goldsmith v. U.S. Board of Tax Appeals*, 270 U.S. 117 (1926) (rejection of admission to bar); *Coe v. Armour Fertilizer Works*, 237 U.S. 413 (1915) (execution against stockholder for unpaid stock subscription); *Londoner v. Denver*, 210 U.S. 373 (1908) (tax assessment for improvements); *Central of Georgia Ry. Co. v. Wright*, 207 U.S. 127 (1907) (tax assessment); *Roller v. Holly*, 176 U.S. 398 (1900) (adequacy of notice period); *Hovey v. Elliott*, 167 U.S. 409 (1897) (court struck defendant's answer); *Scott v. McNeal*, 154 U.S. 34 (1894) (appointment of administrator and sale of estate of living person); *Windsor v. McVeigh*, 93 U.S. (3 Otto) 274 (1876) (condemnation of enemy property); *Ray v. Norseworthy*, 90 U.S. (23 Wall.) 128 (1875) (creditor of bankrupt); *Rees v. City of Watertown*, 86 U.S. (19 Wall.) 107 (1874) (apportionment of municipal debt); *Baldwin v. Hale*, 68 U.S. (1 Wall.) 223 (1864) (creditor of bankrupt).

In recent decisions, this Court has clearly continued and reinforced this constitutional requirement of prior notice and hearing in a variety of contexts. *Fuentes v. Shevin*, 407 U.S. 67 (1972) (statutory replevin); *Bell v. Burson*, 402 U.S. 535 (1971) (administrative suspension of driver's license); *Boddie v. Connecticut*, 401 U.S. 371 (1971) (divorce proceedings); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971) (termination by police chief of public drinking privileges); *Goldberg v. Kelly*, 397 U.S. 254 (1970) and *Wheeler v. Montgomery*, 397 U.S. 280

(1970) (administrative termination of welfare benefits); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969) (prejudgment garnishment); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969) (liability of absent parent corporation); *Armstrong v. Manzo, supra* (child adoption proceedings); *Willner v. Committee on Character and Fitness*, 373 U.S. 96 (1963) (rejection of admission to bar); *Schroeder v. New York*, 371 U.S. 208 (1962) (condemnation).

The Fourteenth Amendment does not impose a straitjacket upon the specific types or forms of procedures which a state may employ to meet the requirements of the due process clause. *Fuentes v. Shevin, supra* at 82; *Boddie v. Connecticut, supra* at 378; *Mullane v. Central Hanover Bank and Trust Co., supra* at 313. The state may balance the various interests at stake in determining whether the form of a notice and a hearing is appropriate to the interests to be affected. *Cf. Lindsey v. Normet*, 405 U.S. 56 (1972). But the proper time for such notice and hearing is not subject to legislative balancing.

The Louisiana sequestration procedure fails to meet the constitutional standard of due process since a defendant is afforded no notice or opportunity for a hearing prior to deprivation of his property. If the statute had provided notice and hearing prior to deprivation, then the balancing test would be appropriate to determine the propriety of that notice and hearing. However, the Louisiana sequestration statute does not require and Mitchell was not given notice or hearing prior to seizure. The balancing test is therefore inappropriate in the instant case.

This Court has made it clear that even a temporary, nonfinal deprivation of property is a "deprivation" within the meaning of the Fourteenth Amendment.

Fuentes v. Shevin, supra at 85; *Bell v. Burson, supra* at 539; *Sniadach v. Family Finance Corp., supra* at 339. Furthermore, "any significant property interest" is protected by the requirements of due process. *Boddie v. Connecticut, supra* at 379. *See Bell v. Burson, supra* at 539; *Goldberg v. Kelly, supra* at 262. Thus, as in *Sniadach* and *Fuentes*, a defendant's interest in the continued possession and use of goods qualifies as a significant property interest and the deprivation of such a property right must be preceded by notice and hearing consonant with due process standards. In such a situation it has been held to be constitutionally irrelevant who has legal title to the goods and whether or not they are absolute necessities of life. *Fuentes v. Shevin, supra* at 86, 88. *See Bell v. Burson, supra* at 539 (suspension of driver's privileges).

However, in the present case, the dispossessed party not only has an interest in the continued possession and use of the goods, but he also has full legal title under Louisiana law, which prohibits conditional sales.[3] In addition, it should be noted that the defendant has been deprived of goods—a stove, refrigerator, clothes washer and stereo—most of which can undoubtedly be defined as necessities.

To be meaningful, notice and hearing must be offered "at a time when the deprivation can still be prevented." *Fuentes v. Shevin, supra* at 81. A procedure which requires prior notice and a hearing in front of a judge automatically provides protection against arbitrary or

---

[3]*See, e.g., Thomas v. Philip Werlein, Ltd.*, 181 La. 104, 158 So. 635 (1935); *Givens v. Southern Farm Bureau Casualty Ins. Co.*, 197 So.2d 380, 382 (La. App. 1967) ("Thus, where an act of sale of movables consummated in Louisiana stipulates that title will not pass until the price has been paid, that condition is without effect and title passes subject to the seller's vendor's lien and chattel mortgage, if any, securing the deferred part of the purchase price.")

mistaken deprivations of property by private parties. *Fuentes v. Shevin, supra* at 81; *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 170-72 (1951) (Frankfurter, J., concurring). A prior hearing protects the creditor against possible damage liability for wrongful taking of property. The limited and expensive resources of the court's officers can also be conserved by eliminating potentially unwarranted and arbitrary seizures. By establishing procedures for prior notice and hearing, the state retains supervision over the repossession process and does not abdicate its control to private individuals. Furthermore, a defendant who is not searching for immediate replacements for the seized property can more effectively prepare a defense and participate in the adversary process or concentrate on alternative arrangements. *See Sniadach v. Family Finance Corp., supra* at 340-42; *Goldberg v. Kelly, supra* at 264.

A bond requirement, conclusory allegations, and possible liability in damages are clearly not a substitute for a hearing prior to seizure of property. As this Court has recognized in *Fuentes v. Shevin, supra* at 83, these requirements "test no more than the strength of the applicant's own belief in his rights." Plaintiffs are fallible, especially when private gain is at stake. Many seizures may go unchallenged because the defendant seeks not a lawsuit but alternative arrangements to fulfill the needs of his family. Only a pre-seizure hearing can provide an effective opportunity to stop unwarranted and arbitrary deprivations of property.

B. The Louisiana Procedure of Sequestration Allows A Credit Seller To Obtain A Judicially Authorized Seizure Of Property *Ex Parte* And Without Prior Notice And Hearing To The Owner Of The Property.

The Louisiana procedure
plaintiff to obtain the seizu
initiating a lawsuit or sho
lawsuit.[4] Seizure pursuant t
upon the plaintiff's claim to
security interest in proper
sion.[5] The present sequestra
1960 as a part of the revis
entire procedural law of Lo
tion has traditionally be
"conservatory" indicating
being temporarily placed i
amendments liberalizing se
readily available to plaintif
plaintiff to obtain immedia
seized have altered the prop

The basis of defendant'
sequestration is the failure
notice and hearing to the c

re of sequestration permits a
ure of property at the time of
ortly prior to the filing of a
to sequestration is predicated
to an ownership, possessory or
rty in the defendant's posses-
ration statutes were enacted in
ision and recodification of the
ouisiana.[6] Although sequestra-
een labeled "provisional" or
that the property seized was
in the custody of the court,
sequestration to make it more
iffs and practices allowing the
iate possession of the property
priety of those labels.

t's constitutional attack upon
e of that procedure to provide
defendant prior to the seizure

[4] *See generally* Johnson, "A
visional Remedies Under the L
38 Tulane L. Rev. 1 (1963).

Attachment and Sequestration: Pro-
Louisiana Code of Civil Procedure,"

[5] La. Code Civ. Pro., Art. 35
in the property to be seized d
other two principal methods of
attachment and executory proc
a fraudulent or some other anti
the creditor will be placed at
La. Code Civ. Pro., Art. 3541. *S*
La. Code Civ. Pro., Arts. 3501
4-5. Executory process is p
judgment contained in a mortg
et seq. See also L'Enfant, "*Fi*
Process and Louisiana Creditor
(1972).

571. The requirement of an interest
distinguishes sequestration from the
of prejudgment seizure in Louisiana,
cess. Attachment is predicated upon
ticipated act of the debtor by which
t a disadvantage pending judgment.
See also "Preliminary Statement" to
01 *et seq.*; Johnson, *supra* note 4, at
predicated upon a confession of
gage. La. Code Civ. Pro., Arts. 2631
Fuentes v. Shevin: Procedural Due
or's Remedies," 33 La. L. Rev. 62

[6] *See* Johnson, *supra* note 4, a
, at 1-3.

of property in his possession. This aspect of sequestration—lack of prior notice and hearing—has been explicitly recognized by the Louisiana Supreme Court:

> When the writ of sequestration issues ex parte upon the sworn allegations of the applicant, seizure of the property takes place immediately without any advance notice to him [the defendant]. Since he is unaware of the proceedings until after the seizure, he is totally without power to prevent its accomplishment. If the seizure is unlawful all defendant can do is retain counsel and move for its dissolution and seek damages and attorney's fees. *Hancock Bank v. W.R. Alexander*, 256 La. 643, 653, 237 So.2d 669, 672 (1970).

Because of the lack of prior notice and hearing, the Louisiana Supreme Court held the statutory requirements must be strictly construed, and the plaintiff may not amend his pleadings to conform to those requirements after the seizure took place.

In its opinion in this case, the Louisiana Supreme Court implicitly acknowledges the lack of a prior notice and hearing requirement in the sequestration statutes. The issue, then, is not whether the procedure of sequestration provides prior notice and hearing, but whether the procedure satisfies the constitutional requirement of due process on some other grounds. For the answer to this, a fuller explanation of sequestration is necessary.

The issuance of the writ of sequestration is predicated upon some interest of the plaintiff in property in the possession of the defendant. Grant's interest in the property seized was its vendor's privilege. (A.16). The vendor's privilege is an unrecorded security interest in goods sold on a credit basis and attaches automatically by operation of Louisiana Civil Code, Article 3227. Gener-

ally, the vendor's privilege continues in effect only as long as the collateral is in the possession of the buyer.[7] While the property is in the possession of the buyer, the vendor's privilege provides the seller with a high preference upon the collateral against other creditors. Because the vendor's privilege arises by operation of law, every Louisiana credit seller has this security interest. Other security devices are available to the Louisiana credit seller[8] and sequestration may issue upon the assertion of other types of interests in the property in dispute, as well.

The sole substantive criteria for the issuance of sequestration are found in Louisiana Code of Civil Procedure, Article 3571: (1) the plaintiff must have a legal interest in the property and (2) in the case of movable goods, the defendant must have possession of or "power" over the goods to be seized.[9] In addition, Louisiana Code of Civil Procedure, Articles 3501 and

---

[7]La. Civ. Code, Arts. 3227 and 3228. *See also* Comment, "Vendor's Privilege," 4 Tulane L. Rev. 239 (1930) (Notes the ability of the vendor in certain situations to assert the privilege upon the collateral even after the vendee gives up possession of the collateral); A. Yiannopoulos, *Louisiana Civil Law Treatise on Property* §108 (1967).

[8]*E.g.*, La. Rev. Stats. §§9:5351 *et seq.* (Louisiana Chattel Mortgage Act); La. Civ. Code, Art. 3133 (Pledge or "layaway" in commercial jargon).

[9]Louisiana Code of Civil Procedure, Article 3571:

Article 3571. Grounds for sequestration

When one claims the ownership or right to possession of property, or a mortgage, lien, or privilege thereon, he may have the property seized under a writ of sequestration, if it is within the power of the defendant to conceal, dispose of, or waste the property or the revenues therefrom, or remove the property from the parish, during the pendency of the action.

3502 require that a lawsuit be filed at the time of applying for the seizure or at a later time if permitted by the court. In the instant case, these requirements were met by the verified, general allegations of the petition and the averments of the attached affidavit to the effect that the plaintiff had a vendor's privilege as a result of the sale of goods to the defendant and that there existed a balance due on the goods. (A.3).

In addition, the plaintiff is required to furnish security in an amount sufficient to protect the defendant against wrongful issuance of a writ of sequestration. La. Code Civ. Pro., Art. 3574. Although the procedure requires the issuing official to set the amount of the bond to be filed, there is no requirement that the official test the surety on the bond as this is ordinarily an adversarial process.[10]

The authorization of the writ of sequestration is a ministerial act. When presented with an affidavit or verified petition and bond, both in the proper form, the issuing official is required to issue a writ of sequestration. In a suit seeking sequestration pursuant to a vendor's privilege and seeking the balance alleged to be due on an open account, the plaintiff was awarded a writ of mandamus compelling the trial judge to issue a writ of sequestration. The Louisiana Supreme Court held in that case, *Zion Mercantile Co. v. Pierce*, 163 La. 477, 480, 112 So. 371 (1927):

> It was the mandatory duty of the judge to sign the order [authorizing sequestration] when presented to him with the proper affidavit and bond, and his refusal to do so cannot be justified on the ground

---

[10] La. Code Civ. Pro., Arts. 5121 *et seq.*

that the petition for the writ had not been filed by the clerk of his court.[11]

Another factor indicating the ministerial nature of the authorization is the provisions of Louisiana Code of Civil Procedure, Articles 282(1) and 283(2) which permit clerks of district courts to fix the amount of the bond and to grant the issuance of a writ of sequestration in parishes other than Orleans.[12]

Once the sequestration is authorized, the actual writ of sequestration (in this case a form supplied by the clerk) is signed by the clerk and delivered to the constable who performs the seizure. In this case, the property was "hauled" and "stored" by Grant, who apparently acted as the constable's "keeper." (Petitioner's Brief, Appendix "C").[13] If necessary, the seizing officer may, pursuant to Louisiana Code of Civil Procedure, Article 325, use force to accomplish a seizure.[14] The seizing officer is then

[11] *But cf. Barrow v. Duplantis*, 147 La. 461, 85 So. 205 (1920) which held that the issuance of a writ of judicial sequestration by the court on its own motion was discretionary and that mandamus would not lie to compel its issuance.

[12] Comment (b) to La. Code Civ. Pro., Art. 282 provides: "This article and Art. 283, *infra*, confer on the clerk of a district court the power and authority to do certain acts, and render and sign certain orders and judgments, which normally are done by the judge himself. Most of these are of a ministerial nature, while the remainder, although involving the exercise of some discretion cannot be classified as strictly judicial." Louisiana Code of Civil Procedure, Article 281 excludes the clerks of the district court for the Parish of Orleans from the provisions of Article 282.

[13] *See generally Bickham Motors v. Crain*, 185 So.2d 271, 275-6 (La. App. 1966) (Explains the duties and liabilities of a plaintiff who acted as the sheriff's "keeper" of the property seized in an executory proceeding, but who allowed the property to deteriorate in value).

[14] Force was not used in this case.

required by Louisiana Code of Civil Procedure, Article 3504 to deliver to the clerk a return showing the manner of execution of the writ and an inventory of the property which was seized. (Petitioner's Brief, Appendices "B" and "C"). As a matter of practice and convenience, the constable serves the defendant with the citation and petition at the time of the seizure. Thus, the first notice the defendant receives of the authorization of the seizure of his property is the constable's knock on the door.

In order to more fully explain the nature of the sequestration procedure, a discussion of the post-seizure sequestration provisions follows. However, by discussing the post-seizure provisions, defendant in no way intends to intimate that such post-seizure provisions could cure the unconstitutional defect of lack of prior notice and hearing. The post-seizure provisions are constitutionally irrelevant and are discussed solely to further illuminate the nature of Louisiana sequestration procedure and what transpired below.

After the seizure has taken place, the statutory scheme affords several options to the plaintiff and defendant. If the defendant can prove in an adversarial hearing that the property seized exceeds the value of the plaintiff's claim, the defendant may obtain a release of the excess property seized. La. Code Civ. Pro., Art. 3505. If the defendant can provide security by a licensed surety or a surety of solvency satisfactory to the constable "for the satisfaction of any judgment which may be rendered against him," he may obtain a release of the property. La. Code Civ. Pro., Arts. 3507 and 5127. If the defendant does not obtain a release pursuant to Louisiana Code of Civil Procedure, Article 3507 within ten days of the seizure, the plaintiff may obtain a release of the property by posting security. La. Code Civ. Pro., Art. 3576. The plaintiff's security undertaking is not released until the

plaintiff obtains a final, non-appealable judgment in his favor. If the defendant fails to file responsive pleadings or take an appeal, the plaintiff may obtain a default judgment within five days of service upon the defendant and the delay for an appeal may expire in as little as thirteen days. La. Code Civ. Pro., Art. 5002. The property seized is not to be sold until after final judgment. La. Code Civ. Pro., Art. 3510.

The preceding aspects of the post-seizure statutory scheme do not appear to be always followed in practice, however. In the instant case, the collateral was immediately taken into the plaintiff's possession, although the constable may have retained legal, constructive custody of the goods. (Petitioner's Brief, Appendices "B" and "C"). The requirement that the plaintiff obtain a final judgment prior to selling the seized property may not always be followed. In *Patterson v. Western Auto Supply Co.*, 125 So.2d 611 (La. App. 1961), the plaintiff, expecting a negotiated settlement, sold the sequestered property prior to obtaining a judgment thereby losing his right to a judgment for any deficiency between the price of the goods and the balance of his claim. The defendant's right to a reduction of an excessive seizure depends upon the doubtful possibility of ascertaining the value of used property and then dividing the excess from the remainder of the property. The security required of a defendant to obtain a release of the property seized is so great an undertaking–the amount of any judgment that could be rendered against him as opposed to the amount of any possible deterioration in the value of the property–as to be prohibitive, particularly for a low income buyer.[15]

---

[15] *See Fuentes v. Shevin, supra* at 84 n. 14.

In practice, the most frequently employed post-seizure procedure and the one used by Mitchell is the adversarial hearing upon the defendant's motion to dissolve the writ of sequestration. Article 3506 of the Louisiana Code of Civil Procedure provides, in relevant part:

> The defendant by contradictory motion may obtain the dissolution of a writ of attachment or of sequestration, unless the plaintiff proves the grounds upon which the writ was issued.[16]

The burden of proving the grounds for issuance of sequestration is clearly upon the plaintiff who provoked the seizure. To "prove the grounds upon which the writ was issued," the plaintiff must satisfy the requirements of Louisiana Code of Civil Procedure, Article 3571 by proving his interest in the property seized,[17] the defend-

---

[16] This provision changed the pre-1960 case law which had placed the burden of proof upon the defendant attacking the sequestration. The burden of proving the grounds for issuance is now clearly upon the plaintiff who obtained the seizure. *See* Comment (a) to La. Code Civ. Pro., Art. 3506; Johnson, *supra* note 4, at 26-27. *See also Charles A. Kaufman Co. v. Gregory*, 244 La. 766, 772, 154 So.2d 392, 395 (1963) (Discussing the manner of proceeding on a motion to dissolve an attachment, the Louisiana Supreme Court states: "[T]his order and burden of proof have been changed by the enactment of Article 3506 of the Louisiana Code of Civil Procedure.")

[17] *See, e.g., Merchant's & Farmer's Bank v. Fischer Lumber Co.*, 136 La. 860, 67 So. 932 (1915) (Seizing party failed to establish his privilege on the property seized); *American Furniture Co. v. Grant-Jung Furniture Co.*, 50 La. Ann. 931, 24 So. 182 (1898) (Seller not entitled to sequestration as seller did not have a vendor's privilege on goods sold in another state); *Queen City Broadcasting Co. v. Wagenwest, Inc.*, 264 So.2d 336 (La. App. 1972) (Plaintiff lacked a valid lien, privilege or chattel mortgage on the property.)

ant's "power" over the property,[18] and the formal adequacy of the affidavit and bond.[19] If the plaintiff proves the grounds for the issuance of the writ of sequestration, the sequestration is maintained, and the

---

[18] *See, e.g., Montagne v. Tinker*, 197 So.2d 154, 156 (La. App.), *writ refused*, 250 La. 916, 199 So.2d 921 (1967) ("We think the plaintiffs have sufficiently alleged the grounds relied upon for the issuance of the writ. They have alleged the lease; that $1400 in rent is due; and that they have a lessors' privilege 'on the movable effects of the lessee which are on the leased premises.' Although they have not expressly used the language of LSA–C.C.P. Article 3571 that 'it is within the power of the defendant' to conceal, etc., they have alleged that they have a lessors' privilege on the 'movable effects of the lessee which are on the leased premises.' The facts that the items are movable, that they belong to the lessee and are located on the leased premises, give rise to the conclusion that 'it is within the power of the defendant' to conceal, dispose of, etc. the property. To allege simply that 'it is within the power of the defendant' would be only a conclusion of fact. Plaintiffs have alleged the specific facts on which such a conclusion is based."); *Ralph's Fleet, Inc. v. American Marine Corp.*, 157 So.2d 317 (La. App. 1963) (Sequestration dissolved upon defendant's showing that it never had possession of the property seized and never disputed the plaintiff's ownership of that property.)

[19] *See, e.g., Hancock Bank v. W.R. Alexander*, 256 La. 643, 237 So.2d 669 (1970) (Louisiana Supreme Court ordered dissolution of writ of sequestration because of the failure of plaintiff to plead his interest in the property seized. The Court also refused to allow the plaintiff to amend the suit to reflect plaintiff's chattel mortgage.); *Fidelity & Casualty Co. of N.Y. v. Harris-Smith, Inc.*, 211 So.2d 339 (La. App. 1968) (Writ of sequestration dissolved as sheriff failed to make an inventory of the property seized.) *But cf. Blitz v. Guenin*, 187 So. 690 (La. App. 1939) (A prior seizure by sequestration had been dissolved as the amount in controversy exceeded the limited jurisdiction of the trial court. The plaintiff instituted a new action within the court's jurisdictional amount and obtained a second sequestration of the property prior to its return to the defendant.)

plaintiff may obtain a sale of the property if he prevails at a trial on the merits. La. Code Civ. Pro., Art. 3510.

Unless relevant to the grounds for the issuance of the writ, the merits of the plaintiff's claim and the claims and defenses of the defendant are reserved until a trial on the merits. Comment (c) to Article 3506 of the Louisiana Code of Civil Procedure states:

> (c) This article retains the jurisprudential rule that only the grounds for the auxiliary remedy can be inquired into on the motion to dissolve, and not the merits of the main demand. (Citations omitted)[20]

Clearly the procedure of sequestration is available to effect a seizure of goods without prior notice and hearing. It is available to all who claim an interest in property in the hands of another. The procedure is available in every credit sales transaction in Louisiana as every credit sale gives rise to a vendor's privilege. Sequestration affords some post-seizure protections to the defendant, but those post-seizure protections are constitutionally inadequate as they come too late.

Grant, in arguing the constitutionality of sequestration, has asserted that despite the lack of prior notice and hearing, sequestration satisfies due process since it is a "procedural right of long standing." However, the modern procedure of sequestration is not truly ancient. It bears marked differences from its historical antecedents.[21] One principal difference is that a plaintiff seeking sequestration is no longer required to show "a reasonable basis to fear" that the defendant will remove, destroy or

---

[20] *See also Tucker & Schonekas v. Dohmann Chevrolet, Inc.*, 260 So.2d 99 (La. App.), *writ refused*, 261 La. 1048, 262 So.2d 37 (1972).

[21] *See generally* Millar, "Judicial Sequestration in Louisiana: Some Account of Its Sources," 30 Tulane L. Rev. 201 (1956).

conceal the property to be seized during the pendency of the suit.[22] This requirement was an integral part of Roman, French and Spanish antecedents of modern Louisiana sequestration.[23] The "fear" criteria for the issuance of sequestration was in effect deleted from Louisiana sequestration by statute in 1912[24] and later by total deletion from the provisions on sequestration.[25] The French action of revendication, which Millar identifies as the prime source for the Louisiana procedure of sequestration,[26] apparently allowed seizure of an instalment buyer's goods only after an adjudication of the right to possession.[27] Even if sequestration was a procedure of long standing, sequestration took on new dimensions in a marketplace where "the use of consumer credit was expanding at an extremely rapid rate."[28] Like the replevin statutes found to be unconstitutional in *Fuentes v. Shevin*, Louisiana sequestration has been subjected to legislative changes which have made the procedure constitutionally intolerable, particularly so when the process of legislative liberalization of the procedure to

---

[22] Johnson, *supra* note 4, at 15.

[23] Millar, *supra* note 21, at 206-18.

[24] Louisiana Act No. 190 of 1912 (repealed 1960), quoted at p. 41-2, *infra*. *See also Gueydan v. T.P. Ranch Co.*, 156 La. 397, 401, 100 So. 541, 543 (1924) (Holding that Act No. 190 of 1912 dispensed with the former sequestration requirement that the plaintiff have reasonable grounds to believe that defendant intended to conceal, part with, or dispose of the goods to be seized.)

[25] Comment (a) to La. Code Civ. Pro., Art. 3571.

[26] Millar, *supra* note 21.

[27] A. Yiannopoulos, *supra* note 7, at 385 n. 61.

[28] *Mourning v. Family Publications Service, Inc.*, ___ U.S.___ , 93 S.Ct. 1652, 1657 (1973).

the favor of secured creditors has been at the expense of the due process rights of the burgeoning group of consumers who purchase goods on credit. This Court observed in *Sniadach v. Family Finance Corp.*: "The fact that a procedure would pass muster under a feudal regime does not mean it gives necessary protection to all property in its modern form."[29]

Grant has also argued that the vendor's privilege is a right without a remedy and therefore sequestration must be found to be constitutional to preserve the vendor's privilege. Such an assertion misses the essential nature of a security interest. The vendor's privilege is, more than anything else, a right of preference to the collateral which can be asserted against other creditors of the buyer. Thus, if another creditor obtains a seizure of the collateral which secures the vendor's privilege, the vendor may intervene in those proceedings and assert his right of preference to the proceeds from the sale of the collateral.[30] In addition to sequestration, the vendor has other remedies for a debt which he proves to be due him. The vendor may sue for the balance of the price which is due[31] and is entitled to any deficiency between the price brought by a public sale of the collateral and the amount of his judgment.[32] He may execute his money judgment by writ of *fieri facias* upon any of the judgment debtor's

---

[29] *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 340 (1969). *See also Papachristou v. City of Jacksonville*, 405 U.S. 156, 163 (1972); *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970); *The Boys Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235 (1970); *Smith v. Allright*, 321 U.S. 649 (1943); *Helvering v. Hallock*, 308 U.S. 106 (1939).

[30] La. Code Civ. Pro., Arts. 1092, 2643.

[31] The plaintiff in this case has brought an action for balances due on the purchases. (A. 3-4).

[32] *M. Marx Sons v. Cooper*, 63 So.2d 883 (La. App. 1953).

non-exempt property, and he can obtain a garnishment of the judgment debtor's wages.[33]

Aside from these inconsistencies in the argument that the seller would be remediless without sequestration, that argument misses the thrust of Mitchell's constitutional attack upon sequestration. The defendant is not asserting that security interests or repossessions are unconstitutional. The defendant only requests that the seizure be postponed until the defendant has been given notice and an opportunity for a hearing prior to the seizure. This is the essence of due process and is required by the Fourteenth Amendment.

II.

THE LOUISIANA PROCEDURE OF SEQUESTRATION DOES NOT COME WITHIN THE SINGLE NARROW EXCEPTION TO THE REQUIREMENT OF NOTICE AND HEARING PRIOR TO THE DEPRIVATION OF PROPERTY.

A. Notice and Hearing May Be Postponed Until After a Deprivation of Property Only in Narrowly Confined "Extraordinary Situations."

Only in a few, narrowly confined cases has this Court found a truly "extraordinary situation" which would justify the postponement of notice and hearing until after an actual deprivation of property. This Court has found such an "extraordinary situation" only in cases "where it

---

[33] La. Code Civ. Pro., Arts. 2291 *et seq.* (*fieri facias*) and Arts. 2411 *et seq.* (garnishment). *See, e.g., M. Marx Sons v. Cooper*, 63 So.2d 883 (La. App. 1953) (After obtaining a sequestration and favorable judgment, the seller was entitled to a garnishment of the buyer's wages to satisfy a deficiency between the amount of the judgment and the proceeds of the public sale of the collateral.); *Sun Sales Co. v. Hodges*, 224 So.2d 157 (La. App.), *aff'd*, 256 La. 687, 237 So.2d 684 (1967).

is essential that government needs be immediately satisfied." *Phillips v. Commissioner*, 283 U.S. 589, 597 (1931). As an exception to the general mandate of due process, this doctrine has been applied in diverse but strictly limited situations: circumstances demanding immediate action for the health and safety of the general public, *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1950); *North American Cold Storage Co. v. City of Chicago*, 211 U.S. 306 (1908); measures designed to alleviate emergency conditions of wartime economic instability, *Yakus v. United States*, 321 U.S. 414 (1944); *Bowles v. Willingham*, 321 U.S. 503 (1944); measures necessary to promote the stability of economic institutions, *Fahey v. Mallonee*, 332 U.S. 245 (1947); *Coffin Brothers Co. v. Bennett*, 277 U.S. 29 (1928); proceedings essential to effectuate the goal of a legitimate governmental function, *Anderson National Bank v. Luckett*, 321 U.S. 233 (1944); *Coffin Brothers Co. v. Bennett, supra; Phillips v. Commissioner, supra;* and departures from traditionally accepted forms and procedures to accommodate the efficient functioning of administrative action, *Best v. Humbolt Placer Mining Co.*, 371 U.S. 334 (1963); *Opp Cotton Mills v. Administrator*, 312 U.S. 126 (1941); *Morgan v. United States*, 304 U.S. 1 (1938); *United States v. Illinois Central R.R. Co.*, 291 U.S. 457 (1934).

In *Fuentes v. Shevin*, those decisions were examined and three criteria necessary to the "extraordinary situation" exception to due process were found:

> Only in a few limited situations has this Court allowed outright seizure without opportunity for a prior hearing. First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt

> action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance. 407 U.S. 67, 90-91 (footnote omitted).

There may be one other exception to the requirement of prior notice and hearing. This Court has held that a businessman could, after informed negotiation and bargaining, confess judgment in a contract. *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174 (1972). In *Fuentes v. Shevin, supra* at 94-96, this Court held that a contractual waiver of procedural due process rights must at the very least be clear and unambiguous, and the Court expressed doubts that a form contract of adhesion could meet constitutional muster even if the contractual waiver were clear. However, in the instant case, a contractual waiver of due process protections has never been asserted or found to be present by any of the lower courts. Since it has never been asserted or found to be present, the contractual waiver issue is not before this Court.

Although the Louisiana Supreme Court did not measure sequestration with regard to all three of the criteria announced in *Fuentes v. Shevin*, it did find that sequestration did meet a single sentence quoted from *Fuentes v. Shevin*. In that sentence this Court stated that "there may be cases in which a creditor could make a *showing* of *immediate danger* that a debtor *will* destroy or conceal disputed goods." *Fuentes v. Shevin, supra* at 93 (emphasis added). The context of that statement clearly shows the sentence to be dictum, and this Court has never upheld a statute upon those grounds alone. However, even assuming that sentence does establish an exception to the requirement of prior notice and hearing, sequestration does not come within the language of that exception.

B. The Louisiana Sequestration Statutes Are Not Narrowly Drawn To Allow the Deprivation of Property Only Upon a Showing of Exceptional Need.

Sequestration was enacted to be, and has been consistently construed to be, a procedure available to one party to obtain the seizure of property without providing notice and a prior hearing to the party in possession of the property. Sequestration is not a narrowly available proceeding. It is clearly available to any plaintiff who believes that he has an interest in the property to be seized, who believes that he has a claim against the defendant, and who is able to file the required security undertaking. Since every Louisiana credit seller has a vendor's privilege, the procedure is available to every credit seller who files a bond and an action asserting that a default has occurred in the transaction.

The decision of the Louisiana Supreme Court in this case clearly indicates that sequestration is not limited to cases of "extraordinary situations." The Louisiana Supreme Court found sequestration was saved from attack by "the *irrefutable* inference that the vendee has, by the act of buying itself, consented to the preservation of the vendor's privilege"[34] and thus theoretically consented to the enforcement of that security device by seizure without prior notice and hearing. This rationale would apply to every credit sale in Louisiana, not simply cases where the seller could show a special need for extraordinary protection. The language of the Court was broad:

> Under Louisiana law, therefore, the purchaser's possession is precarious to this extent: He holds possession with the implied-in-law knowledge that

[34] *W.T. Grant Co. v. Mitchell*, 263 La. 627, 640, 269 So.2d 186, 190-91 (1972) (emphasis added). (A. 29).

> he has acquired the right to possession, subject to the vendor's paramount right to seize the property without hearing should he default in his payments.[35]

Such an irrebuttable presumption of an individual's acquiescence in giving up constitutionally mandated safeguards over property rights is without precedent, and no authority is cited for the "implied-in-law knowledge" rationale. The Louisiana court's "irrefutable inference" flies in the face of this Court's well-defined prohibition against implied waivers of constitutional rights.[36] The "irrefutable inference" creates a conclusive presumption of consent to a patently unconstitutional procedure which runs afoul of this Court's prohibition of conclusive presumptions of critical facts.[37] Indeed, the "implied-in-law knowledge" rationale is so sweeping as to give

---

[35] *Id.*, at 641, 269 So.2d at 191. (A. 29).

[36] *See Fuentes v. Shevin, supra* at 94-5; *Swarb v. Lennox*, 314 F. Supp. 1091, 314 F. Supp. 1112 (E.D. Pa. 1970), *aff'd*, 405 U.S. 191 (1972); *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174 (1972); *Ohio Bell Telephone Co. v. Public Utilities Comm'n.*, 301 U.S. 292, 307 (1937); *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937).

[37] *See, e.g., U.S. Dept. of Agriculture v. Murry*, ___ U.S. ___, 41 U.S.L.W. 5099 (June 25, 1973) (Irrebuttable presumption excluding certain persons from the Food Stamp Program because in the previous year they were claimed as dependents by a taxpayer not himself eligible for food stamps); *Vlandis v. Kline*, ____U.S. ___, 37 L.Ed.2d 63 (1973) (Connecticut's irreversible and irrebuttable statutory presumption of the non-residence of certain students for purposes of tuition at state university); *Stanley v. Illinois*, 405 U.S. 645 (1972) (Illinois' irrebuttable presumption that all unmarried fathers are unqualified to raise their children); *Bell v. Burson*, 402 U.S. 535 (1971) (Conclusive presumption that uninsured motorists who cannot post security are at fault in accidents and therefore may have their licenses suspended without a hearing.)

validity to any state law notwithstanding the direct conflict of the state law with the federal constitution. Such a rationale would supply consent and thus validity to the loss of constitutional protection otherwise afforded to the pregnant woman who seeks an early abortion, the convicted felon who is condemned to capital punishment, or the Black who objects to a Jim Crow law. In this particular context, the Louisiana court's rationale requires an abandonment of procedural due process rights by every Louisiana buyer who enters into a credit sales transaction. The abandonment of procedural due process rights would be "irrefutable" no matter how desperately the Louisiana buyer sought to preserve his constitutional rights.

Nowhere in its opinion did the Louisiana Supreme Court impose a narrowing interpretation upon the statute. The statute remains available to any seller who unilaterally determines that a default has occurred in any instalment sale and despite the fact that the seller could be in error[38] or that the buyer could have a defense or

[38] The plaintiff in this case, though of high repute, is fallible. *See, e.g., W.T. Grant Co. v. California Superior Court of Santa Barbara County*, 23 Cal. App.3d 284, 100 Cal. Rptr. 179 (1972) (W.T. Grant Co. could be charged with violation of a criminal statute upon the showing that it sold used televisions as new); *Johnson v. W.T. Grant Co.*, 2 OEO Pov. L. Rep. ¶16,622 (Minn. Dist. Ct. 1973) (W.T. Grant Co.'s coupon credit selling plan violates usury laws); *Walsh v. W.T. Grant Co.*, 241 A.2d 46 (N.J. Dist. Ct. 1968) (Husband not liable on sales contract between his wife and W.T. Grant Co. despite language in the contract to the contrary); *Holmes v. W.T. Grant Co.*, 71 Misc.2d 486, 336 N.Y.S.2d 601 (N.Y. Sup. Ct. 1972) (Execution by W.T. Grant Co. on home of welfare recipient stayed); *Edmonston v. W.T. Grant Co.*, 57 Misc.2d 37, 291 N.Y.S.2d 864 (N.Y. Cty. Ct. 1968) (Customer not liable to seller for credit coupons thrown away and not actually used).

counterclaim.[39] It should be noted that although the Louisiana court appeared to have assumed that a "default" had occurred in the instant transaction, the record would not support that assumption. A unilateral assertion that Mitchell owed money to Grant did appear in Grant's initial pleading filed with the trial court. (A. 3, 4). However, the merits of the plaintiff's action have not been reached by the trial court and the merits of the claim were not relevant to the motion to dissolve the writ of sequestration. Comment (c) to La. Code Civ. Pro., Art. 3506. Mitchell's response to Grant's underlying action and the merits of the case have both been postponed pending the review of the validity of the sequestration.

The refusal of the Louisiana Supreme Court to impose a narrowing construction upon the procedure of sequestration possibly lies in the availability of other creditor remedies under Louisiana law in more narrow circumstances. These other Louisiana remedies also illustrate that these remedies, and not sequestration, are narrowly available only upon a showing of exceptional need. Although these other remedies may not meet the "exceptional situation" criteria of this Court, they do

[39] *See generally Centanni v. A.K. Roy, Inc.*, 258 So.2d 219, 222 (La. App. 1972) ("Where there is an ambiguity in a printed form contract and a court is called upon to interpret their meaning and import, such ambiguity or contradiction is construed against the party who prepared the contract or printed form."); *Jones v. Paul*, 254 So.2d 915 (La. App. 1971) (Improper acceleration of the balance of the payments); *Gordon Finance Co. v. Chambliss*, 236 So.2d 533 (La. App.), *cert. denied*, 256 La. 869, 239 So.2d 364 (1970) (Usury); *Carter v. Forman*, 219 So.2d 21 (La. App. 1969) (Fraud); *Boudreaux v. Allstate Finance Corp.*, 217 So.2d 439 (La. App. 1968) (Debt collection abuses); *Berger v. DeSalvo*, 156 So.2d 323 (La. App.), *writ refused*, 245 La. 86, 157 So.2d 231 (1963) (Rebate of unearned interest); *Bartlett v. Russell*, 142 So.2d 58 (La. App. 1962) (Redhibition); *Air Conditioning Training Co. v. Knouse*, 46 So.2d 665 (La. App. 1950) (No proof of damages).

embody a narrowness not found in sequestration. The Louisiana procedure of attachment is available upon the clear showing that a debtor is concealing himself or his property or is about to dispose of property with fraudulent intent.[40] If the credit seller had no other adequate remedy and was about to suffer irreparable injury, the Louisiana remedy of injunction might be available upon a clear showing of irreparable injury to protect his interests.[41] The creditor has other remedies available to him, such as executory process if he obtained a confession of judgment in a mortgage,[42] *fieri facias* seizure of savings or other property[43] and garnishment of wages.[44]

---

[40] La. Code Civ. Pro., Art. 3541. However, even this procedure has been so broadly construed as to diminish the facially extraordinary grounds for its issuance. *See Toups v. Toups Truck & Tractor Service, Inc.*, 238 So.2d 200 (La. App. 1970) (Attachment allowed despite the anticipatory nature of the breach of the contract, the absence of fraudulent intent in the criminal sense, the absence of an acceleration clause in the contract between the parties.)

[41] La. Code Civ. Pro., Arts. 3601 *et seq. See also Amacker v. Amacker*, 146 So.2d 672 (La. App. 1962) (Plaintiff suing to be recognized as the owner of a bank account not entitled to an injunction against defendant prohibiting withdrawal from the account as the plaintiff had recourse to sequestration and had failed to show irreparable harm.)

[42] La. Code Civ. Pro., Arts. 2631 *et seq. See also Ross v. Brown Title Co.*, 356 F. Supp. 595 (E.D. La.), *aff'd*, ___ U.S. ___, 41 U.S.L.W. 3644 (1973) (Executory process found to be constitutional); *Buckner v. Carmack*, ____ La. ___, 272 So. 2d 326 (1972), *cert. filed*, 42 U.S.L.W. 3006 (1973) (Constitutional attack on due process grounds upon executory process.)

[43] La. Code Civ. Pro., Arts. 2291 *et seq.*

[44] La. Code Civ. Pro., Arts. 2411 *et seq. See* note 33 *supra.*

The Louisiana Supreme Court also quoted certain language from the opinion in *Fuentes v. Shevin* as a basis for finding sequestration to be constitutional: "There may be cases in which a creditor could make a showing of immediate danger that a debtor will destroy or conceal disputed goods."[45] This sentence was clearly dictum in *Fuentes* inasmuch as no such case was before the Court. However, even assuming that the quoted language embodies an exception to the requirements of prior notice and hearing, sequestration does not fall within that quoted exception. The statute, in its present form simply does not require the creditor to "make a showing of immediate danger that a debtor will destroy or conceal disputed goods." Such a showing was once a prerequisite to the granting of sequestration, but the legislature explicitly deleted this requirement by statute in 1912[46] and by recodification in 1960.[47] The present statute does require a showing that the defendant has the "power" to conceal, dispose of, waste or remove the disputed goods during the pendency of the action.[48] But the requirement of "power" is the equivalent of possession as "power" is inherent in the fact that the possessor of movable goods

[45] *W.T. Grant Co. v. Mitchell, supra* at 640, 269 So.2d at 190 (A. 29) quoting sentence from *Fuentes v. Shevin*, 407 U.S. 67, 93 (1972). The paragraph, from which that sentence was taken, reads: "Nor do the broadly drawn Florida and Pennsylvania statutes limit the summary seizure of goods to special situations demanding prompt action. There may be cases in which a creditor could make a showing of immediate danger that a debtor will destroy or conceal disputed goods. But the statutes before us are not narrowly drawn to meet any such unusual condition. *Sniadach v. Family Finance Corp., supra* at 339. And no such unusual situation is presented by the facts of these cases."

[46] *See* text accompanying note 63 *infra.*

[47] *See* note 6 *supra.*

[48] La. Code Civ. Pro., Art. 3571.

can always dispose of or conceal those goods, if he has that inclination.[49] Being the equivalent of possession, the statutory requirement of "power" to conceal, dispose of, etc., is really no limitation upon the availability of sequestration; every Louisiana buyer has this "power" as long as he is using the property which he purchased.

The Louisiana Supreme Court also discussed the distinctions between the vendor's privilege and the common law conditional sale as a factor to be considered in determining the constitutionality of sequestration. The thrust of the discussion was that the vendor's privilege is such a precarious security device that it requires the protection of sequestration at the expense of due process and that the common law conditional seller, on the other hand, has so much stronger a legal position that he has no real need for the replevin statutes found to be unconstitutional in *Fuentes v. Shevin.*[50] The error of the Louisiana decision is that it ignores the decision of this Court in *Fuentes v. Shevin* and the long line of cases on which *Fuentes v. Shevin* was based. The Louisiana Supreme Court found due process must be sacrificed to enforce a purely private security device without prior notice and hearing notwithstanding the availability of other remedies and the very basic interests of Mitchell in the property which was seized. The Louisiana court weighed sequestration against procedural due process and found that procedural due process must give way.

The Louisiana Supreme Court found that procedural due process must give way to sequestration not because sequestration is available only upon a clear showing of a special need for very prompt action, but because it perceived the *ex parte* aspect of sequestration to be

---

[49] *See* note 18 *supra.*

[50] *W.T. Grant Co. v. Mitchell, supra* at 641-42, 269 So.2d at 191 (A. 29-30).

necessary to the vitality of the Louisiana vendor's privilege. The vendor's privilege was characterized as a right without a remedy which depended upon sequestration for its enforcement. That characterization of the vendor's privilege ignores several important considerations. The vendor's privilege, above all else, provides the Louisiana seller with a right of preference to the collateral, and that preference is good against any other creditor of the buyer except the lessor of the premises in which the collateral is kept.[51] The vendor's privilege is related to the provision in the Louisiana Civil Code prohibiting the retention by a seller of title to goods sold on credit,[52] but the Louisiana court failed to even consider the buyer's full legal title to the goods seized. In addition, the Louisiana court failed to note at that point in its opinion that other security devices[53] and other remedies[54] are available to the credit seller.

The cure of any deficiencies in the vendor's privilege as a security device should not be made at the expense of due process. The deficiencies in the vendor's privilege could be cured simply by legislation along the lines of Uniform Commercial Code Article 9 providing for ease in the recording of security devices and allowing the secured party to pursue the collateral in the hands of third parties. Indeed, this deficiency has been cured to some extent by the Louisiana Chattel Mortgage Act.[55] Furthermore, the Court's concern for the vendor's security

[51] La. Civ. Code, Art. 3263. *But cf.* Dainow, "Vicious Circles in the Louisiana Law of Privileges," 23 La. L. Rev. 1 (1964).

[52] *See* note 3 *supra.*

[53] *See* note 8 *supra.*

[54] *See* notes 40-44 *supra.*

[55] *See also* note 8 *supra.*

device was misdirected. Giving prior notice and hearing would not cause the destruction or forfeiture of the vendor's security device. Due process only requires that the enforcement of the security device be postponed until the validity of the underlying claim is subjected to adversarial scrutiny. Perhaps in truly extraordinary circumstances, due process would allow enforcement of a private security device to occur prior to notice and hearing. However, the sequestration statutes are tailored to apply to the ordinary case not to the extraordinary situation.

Moreover, the sequestration statutes do not require a "showing" in the constitutional sense, much less "a showing of immediate danger that a debtor will destroy or conceal disputed goods." *Fuentes v. Shevin, supra* at 93. The issuance of a writ of sequestration does not require the specific, detailed showing of probable cause necessary to obtain a search warrant[56] nor does it require the specific, detailed showing of the likelihood of immediate and irreparable injury necessary to obtain a temporary restraining order.[57] Sequestration issues upon the *pro forma* showing of the plaintiff that he is about to file an action,[58] he has an interest in property in the possession of the defendant, and he has posted a surety bond.[59] The issuance of the writ is ministerial[60] and no test of the validity of the seizure occurs until after the seizure. As this Court stated in *Fuentes v. Shevin, supra* at 93:

---

[56] *Fuentes v. Shevin, supra* at 93 n. 30.

[57] La. Code Civ. Pro., Art. 3603. *See also* Fed. R. Civ. Pro. 65 (b).

[58] *See Kosches v. Nichols*, 68 Misc.2d 795, 327 N.Y.S.2d 968, 970 (Civ. Ct., N.Y. Cty., 1971) (". . . most affidavits are pro forma based on hearsay and speculation, and even the creditor may not know of a valid defense the debtor has to the action.")

[59] *See* notes 10, 12 *supra*.

[60] *See* notes 11, 12 *supra*.

> . . . The statutes, moreover, abdicate effective state control over state power. Private parties, serving their own private advantage, may unilaterally invoke state power to replevy goods from another. No state official participates in the decision to seek a writ; no state official reviews the basis for the claim to repossession; and no state official evaluates the need for immediate seizure. There is not even a requirement that the plaintiff provide any information to the court on these matters. The State acts largely in the dark. (footnote omitted).

C. W.T. Grant Company Did Not Proceed in a Manner Which Would Cure the Facial Unconstitutionality of the Louisiana Sequestration Procedure.

The Louisiana Supreme Court quoted certain language from the pleadings of Grant, without ever making clear the legal significance of those pleadings either under Louisiana law or under the United States Constitution. The language which was quoted was the averment that the plaintiff had a "fear" that Mitchell would "encumber, alienate, or otherwise dispose of the merchandise . . . during the pendency of these proceedings, and that a writ of sequestration is necessary . . ." *W.T. Grant Co. v. Mitchell, supra* at 630, 269 So.2d at 2187 (1972). (A. 22). Before discussing the ramification of that language under Louisiana law and in the context of the instant case, it is necessary to consider the constitutional principles involved.

This Court has been firm in its position that due process must be provided on the face of a statute or by a clear, authoritative construction of the statute requiring due process:

> Nor can extra-official or casual notice, or a hearing granted as a matter of favor or discretion, be

deemed a substantial substitute for the due process of the law that the Constitution requires. In *Stuart v. Palmer*, 74 N.Y. 183, 188, which involved the validity of a statute providing for assessing the expense of a local improvement upon the lands benefited, but without notice to the owner, the court said: "It is not enough that the owners may by chance have notice, or that they may as a matter of favor have a hearing. The law must require notice to them, and give them the right to a hearing and an opportunity to be heard." The soundness of this doctrine has repeatedly been recognized by this court. Thus in *Security Trust Co. v. Lexington*, 203 U.S. 323, 333 the court, by Mr. Justice Peckham, said, with respect to an assessment for back taxes: "If the statute did not provide for a notice in any form, it is not material that as a matter of grace or favor notice may have been given of the proposed assessment. It is not what notice, uncalled for by the statute, the taxpayer may have received in a particular case that is material, but the question is, whether any notice is provided for by the statute" (citing the New York case). So in *Central of Georgia Ry. v. Wright*, 207 U.S. 127, 138, the court said: "This notice must be provided as an essential part of the statutory provision and not awarded as a mere matter of favor or grace." . . . *Roller v. Holly*, 176 U.S. 398, 409 . . . . And in *Louis. & Nash. R.R. v. Stock Yards Co.*, 212 U.S. 132, 144, it was said: "The law itself must save the parties' rights, and not leave them to the discretion of the courts as such." *Coe v. Armour Fertilizer Works*, 237 U.S. 413, 424-425 (1915).

The constitutional question decided by *Coe* may have been raised by the Louisiana Supreme Court when it quoted in its opinion certain allegations made by Grant in its initial pleadings. In this case, the question would not

be whether Grant cured the failure of the statute to provide prior notice and hearing as no prior notice and hearing were given to Mitchell. The question is whether Grant's generalized conclusion of a "fear" that Mitchell would "encumber, alienate, or otherwise dispose of the merchandise" would constitute a constitutionally valid showing of a need for very prompt action.

The Louisiana Supreme Court prefaced its finding of constitutionality with a cross-reference to those allegations of "fear": "Aside from the quoted allegations of the petition and averments of attached affidavits . . ."[61] Rather than resting its decision upon the language quoted from the plaintiff's initial pleadings, the Louisiana Supreme Court found sequestration to be constitutional using its "implied-in-law knowledge" rationale. Thus, after leaving the door ajar, the Louisiana Supreme Court refused to walk through it. There are sound reasons which may have prompted the Court to refuse to rest its opinion on those initial pleadings. The most obvious is that those allegations were legally superfluous. Although the pre-1960 sequestration statutes technically required such allegations, the present sequestration statutes do not. Indeed, for a period of almost fifty years, 1912 to 1960, such allegations were routinely allowed with unabashed statutory recognition of the *pro forma* nature of the allegations:

> ACT NO. 190.
>
> To Define What Shall Be Deemed to Justify an Affidavit for the Issuance of a Writ of Sequestration under Paragraph 8 of Article 275 of the Code of Practice.
>
> Section 1. Be it enacted by the General Assembly of the State of Louisiana: That in cases of sequestra-

[61] *W.T. Grant Co. v. Mitchell, supra* at 640, 269 So.2d at 190.

> tion of movable property obtained upon the grounds specified in Paragraph 8 of, Article 275 of the Code of Practice, whether based upon a claim to a right of possession to, or upon a claim to a privilege upon movable property, *the fact that it lies within the power* of the defendant to conceal, part with, or dispose of the movable in his possession, during the pendency of the suit, *shall be deemed sufficient to justify an affidavit by the plaintiff,* for the purposes of obtaining the writ of sequestration, *that he fears that the defendant will* so conceal, part with, or dispose of the property in question.
>
> Section 2. Be it further enacted, etc., That all laws or parts of laws in conflict with the provisions of this act, be and the same are hereby repealed. La. Act No. 190 of 1912. (repealed 1960). (emphasis added).[62]

Act No. 190 of 1912 was more straightforwardly inserted into the sequestration statutes in 1960 by deleting the requirement of fear altogether. Comment (a) to La. Code Civ. Pro., Art. 3571.[63] Without a more definite showing, it may be inferred without difficulty that the quoted allegations of "fear" were merely hollow echoes from the old statute, long repealed.

Even if the quoted allegations were to be given some vitality, they would still constitute an insufficient showing to satisfy due process. Any showing other than that required by the sequestration statutes would be legally superfluous to the issuance of a writ of sequestration. It was the mandatory duty of the judge to issue the writ of sequestration upon pleadings and affidavits which met

---

[62] *See also* note 24 *supra.*

[63] *See* note 24 *supra.*

the statutory requirements[64] and the constitutional requirement of showing the presence of an "extraordinary situation" would be irrelevant under the statutes. The initial pleadings are not subjected to close scrutiny—the issuance of a writ of sequestration is a ministerial act which a clerk may perform.[65] The official who issues the sequestration is not required to test the validity of the showing as this function is reserved for the post-seizure motion to dissolve.

The "showing" made by Grant in its initial pleadings was not the detailed, clear showing of facts required by the Constitution. The allegations are obviously *pro forma* legal jargon which show not facts but, if anything, inconsistent subjective conclusions of opinion.[66] No facts are recited to substantiate or support the subjective conclusions of fear that the defendant "will encumber, alienate or otherwise dispose of the merchandise." (A. 3, 4). The acts of encumbering, alienation and disposal are distinct, inconsistent acts, and the inconsistencies are not explained. The format of the petition and the credit manager's affidavit indicate both to be part of a form with spaces and underdelineations to be filled in. (R. 1, pp. 1, 2).[67] The language that was quoted by the Louisiana Supreme Court was obviously not the language to be filled into the spaces or the underdelineations. The allegations of "fear" were abandoned by Grant at the earliest possible point in these proceedings and were never reasserted as an actual basis for obtaining the seizure. At the evidentiary hearing on the motion to

---

[64] *See* text accompanying note 11 *supra.*

[65] *See* note 12 *supra.*

[66] *See* note 58 *supra.*

[67] The spacing and underdelineations as they appeared in the petition were not printed in the Single Appendix.

dissolve, Grant rested its assertion of entitlement to seizure upon its vendor's privilege alone and was content to rely solely upon the joint stipulation of counsel: "It is stipulated that the vendor's lien did exist on the items." (A. 16). Significantly, this was the only showing of the plaintiff pursuant to the requirements of Louisiana Code of Civil Procedure, Article 3506, which provides that the ". . . defendant by contradictory motion may obtain the dissolution of a writ of attachment or of sequestration, unless the plaintiff proves the grounds upon which the writ was issued." The opinion of the trial court does not evidence any reliance upon the existence of an extraordinary situation as none was required by the law and none was presented to that court. (A. 17-19).

Grant's suit is ordinary and not extraordinary. It is a claim that one of its customers is delinquent in paying upon several instalment sales and that the delinquency entitles Grant to the accelerated balances of all the remaining instalments. What is constitutionally offensive is the fact that Mitchell was deprived of the goods sold to him prior to any adjudication of the validity of the plaintiff's claims. Because he had purchased the goods, was using the goods and had made payments upon those goods, Mitchell was entitled to notice and a hearing before the seizure of those goods. Although this case has not yet proceeded to the merits of Grant's claim, there are legal problems posed by the exhibits filed into the record (but not into evidence) by the plaintiff which defendant may desire to raise.[68] For example, the exhibits provide for late charges upon delinquent instal-

[68] (R. 3, p. 1, 2, 3). The exhibits were attached to plaintiff's petition as exhibits and have not been put into the record as evidence.

ments, and those charges might render the contracts usurious.[69] The disclosure of the finance charges or of the plaintiff's security interest might not have been sufficiently conspicuous or in a meaningful manner as required by the Truth In Lending Act.[70] The plaintiff may have lost its option to strictly enforce the various acceleration clauses of the contracts by acquiescence in accepting late instalments from the buyer.[71] These and other defenses or claims[72] may be available to the Louisiana defendant whose property may be subjected to seizure by sequestration. The defendant should be given a meaningful opportunity for a hearing upon his defense or claim. To be meaningful, that opportunity must come before he is deprived of the use and enjoyment of his property.

CONCLUSION

W.T. Grant Company seized Lawrence Mitchell's refrigerator, stove, clothes washer, and phonograph without prior notice and without a prior opportunity for a

---

[69] *See generally Thrift Funds of Baton Rouge v. Jones*, ___ La. ___, 274 So.2d 150 (La. Sup. Ct. 1973) (Late charges in excess of 8% per annum render discount note usurious and lender must forfeit all interest.); *Gordon Finance Co. v. Chambliss*, 236 So.2d 533 (La. App.), *cert. denied*, 256 La. 869, 239 So.2d 364 (1970) (Note taken in connection with the sale of an automobile usurious for providing late charges in excess of 8% per annum).

[70] 15 U.S.C.A. §§1601 *et seq.* (1968 as amended).

[71] *See generally Jones v. Paul*, 254 So.2d 915 (La. App. 1971) (Bond for deed seller of a house could not require strict compliance with payment schedule after six years of acquiescence in late payments unless he gave the buyer notice that strict compliance would be required in the future). *But cf. Rex Credit Co., Inc. v. Kirsch*, 4 So.2d 797 (La. App. 1941) (No acquiescence where creditor protested against delinquent payment of instalments).

[72] *See* note 39 *supra*.

hearing. That seizure was accomplished by the Louisiana procedure of sequestration as embodied in a series of broadly written, construed, and applied statutes. The Louisiana sequestration statutes offend the requirements of due process that no person shall be deprived of property without being first given prior notice and a meaningful opportunity to defend his interests. Neither the sequestration statute nor the facts of this case come within any previously suggested exception of this Court to the requirements of procedural due process.

For the above reasons, Petitioner Lawrence Mitchell respectfully requests that the decision of the court below be vacated and reversed.

Respectfully submitted,

ROBERT J. HOBBS
National Consumer Law Center, Inc.
One Court Street
Boston, Massachusetts 02108
Tel: (617) 523-8010

OKLA JONES, II
2643 Desire Street
New Orleans, Louisiana 70117
Tel: (504) 522-0617

JOHN W. REED
2735 Tulane Avenue
New Orleans, Louisiana 70119
Tel: (504) 822-4489

Attorneys for Petitioner

APPENDIX A

STATUTES

PROVISIONS OF THE LOUISIANA CODE OF CIVIL PROCEDURE

Art. 282. Acts which may be done by district court clerk

The clerk of a district court may:

(1) Grant an appeal and fix the return day thereof; fix the amount of the bond for an appeal, or for the issuance of a writ of attachment or of sequestration, or for the release of property seized under any writ, unless fixed by law; appoint an attorney at law to represent a nonresident, absent, incompetent, or unrepresented defendant; or dismiss without prejudice, on application of plaintiff, an action or proceeding in which no exception, answer, or intervention has been filed; and

* * * * *

Art. 283. Orders and judgments which may be signed by district court clerk

* * * * *

(2) An order for the issuance of executory process, of a writ of attachment or of sequestration, or of garnishment process under a writ of fieri facias, attachment, or of sequestration; the release under bond of property seized under a writ of attachment or of sequestration; or to permit the filing of an intervention;

* * * * *

Art. 325. Right of entry for execution; may require assistance of others if resistance offered or threatened

In the execution of a writ, mandate, order, or judgment of a court, the sheriff may enter on the lands, and into the residence or other building, owned or occupied by the judgment debtor or defendant. If necessary to effect entry, he may break open any door or window. If resistance is offered or threatened, he may require the assistance of the police, of neighbors, and of persons present or passing by.

Art. 3501. Petition; affidavit; security

A writ of attachment or of sequestration shall issue only when the nature of the claim and the amount thereof, if any, and the grounds relied upon for the issuance of the writ clearly appear from specific facts shown by the petition verified by, or by the separate affidavit of, the petitioner, his counsel or agent.

The applicant shall furnish security as required by law for the payment of the damages the defendant may sustain when the writ is obtained wrongfully.

Art. 3502. Issuance of writ before petition filed

A writ of attachment or of sequestration may issue before the petition is filed, if the plaintiff obtains leave of court and furnishes the affidavit and security provided in Article 3501. In such a case the petition shall be filed on the first judicial day after the issuance of the writ of attachment or of sequestration, unless for good cause shown the court grants a longer delay.

Art. 3504. Return of sheriff; inventory

The sheriff, after executing a writ of attachment or sequestration, shall deliver to the clerk of the court from which the writ issued a written return stating the manner in which he executed the writ. He shall annex to the return an inventory of the property seized.

Art. 3505. Reduction of excessive seizure

If the value of the property seized under a writ of attachment or of sequestration exceeds what is reasonably necessary to satisfy the plaintiff's claim, the defendant by contradictory motion may obtain the release of the excess.

Art. 3506. Dissolution of writ; damages

The defendant by contradictory motion may obtain the dissolution of a writ of attachment or of sequestration, unless the plaintiff proves the grounds upon which the writ was issued. If the writ of attachment or of sequestration is dissolved, the action shall then proceed as if no writ had been issued.

The court may allow damages for the wrongful issuance of a writ of attachment or of sequestration on a motion to dissolve, or on a reconventional demand. Attorney's fees for the services rendered in connection with the dissolution of the writ may be included as an element of damages whether the writ is dissolved on motion or after trial on the merits.

Art. 3507. Release of property by defendant; security

A defendant may obtain the release of the property seized under a writ of attachment or of sequestration by furnishing security for the satisfaction of any judgment which may be rendered against him.

Art. 3508. Amount of security for release of attached or sequestered property

The security for the release of property seized under a writ of attachment or of sequestration shall exceed by one-fourth the value of the property as determined by the court, or shall exceed by one-fourth the amount of the claim, whichever is the lesser.

Art. 3510. Necessity for judgment and execution

Except as provided in Article 3513, a final judgment must be obtained in an action where a writ of attachment or of sequestration has issued before the property seized can be sold to satisfy the claim.

Art. 3512. Release of plaintiff's security

The security required of the plaintiff for the issuance of a writ of attachment or of sequestration shall be released when judgment is rendered in his favor and is affirmed on appeal or when no appeal has been taken and the delay for appeal has elapsed.

Art. 3541. Grounds for attachment

A writ of attachment may be obtained when the defendant:

(1) Has concealed himself to avoid service of citation;

(2) Has mortgaged, assigned, or disposed of his property or some part thereof, or is about to do any of these acts, with intent to defraud his creditors or give an unfair preference to one or more of them;

(3) Has converted or is about to convert his property into money or evidences of debt, with intent to place it beyond the reach of his creditors;

(4) Has left the state permanently, or is about to do so before a judgment can be obtained and executed against him; or

(5) Is a nonresident who has no duly appointed agent for service of process within the state.

Art. 3571. Grounds for sequestration

When one claims the ownership or right to possession of property, or a mortgage, lien, or privilege thereon, he may have the property seized under a writ of

sequestration, if it is within the power of the defendant to conceal, dispose of, or waste the property or the revenues therefrom, or remove the property from the parish, during the pendency of the action.

Art. 3574. Plaintiff's security

An applicant for a writ of sequestration shall furnish security for an amount determined by the court to be sufficient to protect the defendant against any damage resulting from a wrongful issuance, unless security is dispensed with by law.

Art. 3576. Release of property under sequestration

If the defendant does not effect the release of property seized under a writ of sequestration, as permitted by Article 3507, within ten days of the seizure, the plaintiff may effect the release thereof by furnishing the security required by Article 3508.

Art. 5123. Testing sufficiency and validity of bond

Any person in interest wishing to test the sufficiency, solvency of the surety, or validity of a bond furnished as security in a judicial proceeding shall rule the party furnishing the bond into the trial court in which the proceeding was brought to show cause why the bond should not be decreed insufficient or invalid, and why the order, judgment, writ, mandate, or process conditioned on the furnishing of security should not be set aside or dissolved. If the bond is sought to be held invalid on the ground of the insolvency of a surety other than a surety company licensed to do business in this state, the party furnishing the bond shall prove the solvency of the surety on the trial of the rule.

Art. 5124. Furnishing new or supplemental bond to correct defects of original

Within four days, exclusive of legal holidays, of the rendition of judgment holding the original bond insufficient or invalid, or at any time if no rule to test the original bond has been filed, the party furnishing it may correct any defects therein by furnishing a new or supplemental bond, with either the same surety if solvent, or a new or additional surety.

The new or supplemental bond is retroactive to the date the original bond was furnished, and maintains in effect the order, judgment, writ, mandate, or process conditioned on the furnishing of security.

The furnishing of a supplemental bond, or the furnishing of a new bond by a different surety, does not discharge or release the surety on the original bond; and the sureties on both are liable in solido to the extent of their respective obligations thereon and may be joined in an action on the bond.

Art. 5127. Release bond

No property seized under any order, judgment, writ, mandate, or process of a court may be released from seizure under a release or forthcoming bond unless it is executed by:

(1) A surety company licensed to do business in this state; or

(2) An individual surety, and has been approved by the sheriff after the latter has satisfied himself of the solvency of the surety.

Articles 5121 through 5126 apply to a release or forthcoming bond.

PROVISIONS OF THE LOUISIANA CIVIL CODE

Art. 3227. He who has sold to another any movable property, which is not paid for, has a preference on the price of his property, over the other creditors of the purchaser, whether the sale was made on a credit or without, if the property still remains in the possession of the purchaser.

So that although the vendor may have taken a note, bond or other acknowledgment from the buyer, he still enjoys the privilege.

Any person who may sell the agricultural products of the United States in the city of New Orlenas [Orleans], shall be entitled to a special lien and privilege thereon to secure the payment of the purchase money, for and during the space of five days only, after the day of delivery; within which time the vendor shall be entitled to seize the same in whatsoever hands or place they may be found, and his claim for the purchase money shall have preference over all others. If the vendor gives a written order for the delivery of any such products and shall say therein that they are to be delivered without vendor's privilege, then no lien shall attach thereto.

Art. 3228. But if he allows the things to be sold, confusedly with a mass of other things belonging to the purchaser, without making his claim, he shall lose the privilege, because it will not be possible in such a case to ascertain what price they brought.

LOUISIANA ACT NO. 190 OF 1912

ACT NO. 190.

To Define What Shall Be Deemed to Justify an Affidavit for the Issuance of a Writ of Sequestration under Paragraph 8 of Article 275 of the Code of Practice.

Section 1. Be it enacted by the General Assembly of the State of Louisiana: That in cases of sequestration of movable property obtained upon the grounds specified in Paragraph 8 of, Article 275 of the Code of Practice, whether based upon a claim to a right of possession to, or upon a claim to a privilege upon movable property, the fact that it lies within the power of the defendant to conceal, part with, or dispose of the movable in his possession, during the pendency of the suit, shall be deemed sufficient to justify an affidavit by the plaintiff, for the purposes of obtaining the writ of sequestration, that he fears that the defendant will so conceal, part with, or dispose of the property in question.

Section 2. Be it further enacted, etc., That all laws or parts of laws in conflict with the provisions of this act be, and the same are hereby repealed. (repealed 1960)

APPENDIX B

RETURN OF CONSTABLE OF FIRST CITY COURT
FOR THE CITY OF NEW ORLEANS

2b

No. [redacted] 70C148-248

M. T. GRANT COMPANY

Versus

LAWRENCE MITCHELL

Notice of Seizure

STATE OF LOUISIANA

CONSTABLE'S OFFICE

of the

FIRST CITY COURT

For The City of New Orleans

ROOM 208

CIVIL COURTS BUILDING, 421 Loyola Avenue

In the Civic Center

NEW ORLEANS, Feb. 1, 19 72

To Lawrence Mitchell, 7611 Chef Monteur Highway, Apt. A-10, New Orleans, La.

PLEASE TAKE NOTICE — That by virtue of writ of Sequestration

issued in the above mentioned suit, I have seized and taken into my possession the following described property, to-wit:

(1) Bedford Refrigerator
(1) Bedford Range
(1) Bedford Heater
(1) Bedford Washer

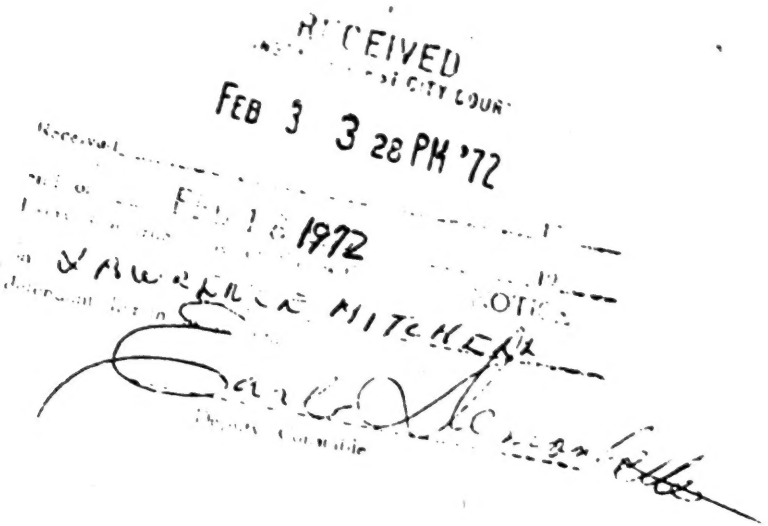
To pay and satisfy the writ issued in case, say the sum of ($574.47 Five Hundred Seventy-Four Dollars and Seventeen cents with interest and cost.

Form 120

Warning — For your own protection this seizure can only be released by the constable.

CLYDE F. BILL, SR., Constable.

By _____ Deputy


RECEIVED
FEB 3 3 28 PM '72

APPENDIX C

INVENTORY OF CONSTABLE OF FIRST CITY COURT FOR THE CITY OF NEW ORLEANS

CONSTABLE FIRST CITY COURT

NEW ORLEANS

NO 14844 Dec 18 19 72

W. T. Grant Co.

VERSUS

Laurence Mitchell

SEIZED FROM: NAME Laurence Mitchell ADDRESS 7611 Hall

SEIZED BY E. C. Nemerito DATE SEIZED 12-19-72

STORED AT: Frank's (DEPOT) THIS CAR HAULED BY Frank's

MERCHANDISE SEIZED: (ITEMIZE)

1 Packard Refrigerator
1 " Range
1 " Stove
1 " Washer

Custody of Constable Donegan

POINTED OUT BY: [illegible]

RECEIVED BY: J. Donegan

NAME OF DRIVER: _____

FOR: _____

13a

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
SEP 12 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973

No. 72-6160

LAWRENCE MITCHELL,
Petitioner,

v.

W.T. GRANT COMPANY,
Respondent.

RESPONDENT'S BRIEF

THOMAS J. O'SULLIVAN
14 Wall Street
New York, New York 10005

MARSHALL J. FAVERET
527 Hibernia Bank Building
New Orleans, Louisiana 70112

Attorneys for Respondent

Of Counsel:
ANTHONY A. SANTA BARBARA
WHITE & CASE

FAVERET AND FAVERET

TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdictional Statement	2
Constitutional and Statutory Provisions Involved	2
Questions Presented	4
Statement of the Case	4
Summary of Argument	11
Argument:	
I—The centuries-old Louisiana sequestration statute should not be held unconstitutional in a case where the factual record is so patently unclear and inadequate	13
II—Where there was a determination below adverse to petitioner's claim to continued possession of movable property, petitioner can assert no injury to himself for failure to have had a prior hearing	19
III—There is no good reason to extend the rule in *Fuentes* to the Louisiana law of sequestration.	27
A. The Louisiana law, based upon the Civil Code and stemming from entirely different legal traditions, involves different legal concepts, and therefore should be accorded separate treatment	27
B. The Supreme Court of Louisiana properly held that the sequestration in the present case did not violate constitutional requirements of due process	33
Conclusion	50

TABLE OF AUTHORITIES

PAGE

Cases:

Adams v. Egley, 338 F. Supp. 614 (S.D. Cal. 1972), appeal docketed, No. 72-1484, *sub nom.* Adams v. Southern California National Bank (9th Cir.) 36
Adams Machine Co. v. Newman, 107 La. 702, 32 So. 38 (1902) 44
Almor Furniture & Appliances Inc. v. MacMillan, 116 N.J. Super. 65, 280 A.2d 862 (1971) 47
American Creosote Co. v. Springer, 257 La. 116, 241 So.2d 510 (1970) 44
American Steel Building Co. v. Brezner, 158 So.2d 623 (La. App. 1963) 25
Anti-Fascist Committee v. McGrath, 341 U.S. 123 (1951) 45

Barrow v. Duplantis, 147 La. 461, 85 So. 205 (1920) 40
Bates-Crumley Chevrolet Co. v. Brown, 141 So. 436 (La. App. 1932) 22, 24, 25
Bianchi v. Morales, 262 U.S. 170 (1923) 32
Bickham Motors Inc. v. Crain, 185 So.2d 271 (La. App. 1966) 16, 28
Board of Regents v. Roth, 408 U.S. 564 (1972) 21
Boddie v. Connecticut, 401 U.S. 371 (1971) 21
Bogalusa Ice Co. v. Moffett, 188 La. 598, 177 So. 679 (1937) 40
Boland v. Essex County Bank and Trust Co., 42 U.S.L.W. 2116 (D. Mass. Aug. 15, 1973) 36
Brinkley v. Northside Motors, 42 U.S.L.W. 2115 (Fla. Sup. Ct. July 31, 1973) 36
Brown v. United States National Bank, 509 P.2d 442 (Ore. 1973) 36
Buckner v. Carmack, —— La. ——, 272 So.2d 326, cert. filed 42 U.S.L.W. 3006 (April 10, 1973), U.S. App. Pndg. 38, 46, 48, 49

PAGE

Cafeteria Workers v. McElroy, 367 U.S. 886 (1961) 35
Cottonport Bank v. Dunn, 21 So.2d 525 (La. App. 1945) 24

D. H. Holmes Co. v. Morris, 188 La. 431, 177 So. 417 (1937) 43
D. H. Overmeyer Co. v. Frick Co., 405 U.S. 174 (1972) 33
Dickinson v. Texana Oil Co., 144 La. 489, 80 So. 669 (1919) 40
Dreyfous v. Cade, 138 La. 297, 70 So. 231 (1915) 43

Fleitas v. Richardson, 147 U.S. 538 (1893) 48
Forrey v. Strange, 158 La. 941, 105 So. 21 (1925) 44
Fuentes v. Shevin, 407 U.S. 67 (1972) ..... *passim*

Greene v. The First National Exchange Bank of Virginia, 348 F. Supp. 672 (W. D. Va. 1972) 36

Hancock Bank v. Alexander, 256 La. 643, 237 So.2d 669 (1970) 40, 41
Herbert v. Hurwitz Mintz Furniture Co., 21 So.2d 638 (La. App. 1945) 24
Hernandez v. European Auto Collision, Inc., —— F.2d —— (2d Cir. June 29, 1973) 21
Hurtado v. California, 110 U.S. 516 (1884) 32

J. C. Trahan Drilling Contractor, Inc. v. Sterling, 335 F.2d 65 (5th Cir. 1964) 40
Jennings v. Mahoney, 404 U.S. 25 (1971) 21
Johnson v. Zerbst, 304 U.S. 458 (1938) 26

Kimbrough v. United States, 364 U.S. 661 (1961) 14
Kirksey v. Theilig, 351 F. Supp. 727 (D. Col. 1972) 36

PAGE

Levy v. Fitzpatrick, 40 U.S. 167 (1841) 48
Lindsey v. Normet, 405 U.S. 56 (1972) 22
Louisiana State Rice Milling Co., Inc. v. Potter, 179 La. 197, 153 So. 690 (1934) 24
Lucas v. Wisconsin Electric Power Co., 466 F.2d 638 (7th Cir. 1972) 47

Massachusetts v. Painten, 389 U.S. 560 (1968) 14
Mathe v. Mathe, 177 La. 579, 148 So. 884 (1933) 40
McClanahan v. Morauer & Hartzell, 404 U.S. 16 (1971) 14
McCormick v. First National Bank, 322 F. Supp. 604 (S.D. Fla. 1971) 36
Messenger v. Sandy Motors, Inc., 121 N.J. Super. 1, 295 A.2d 402 (1972) 36
Michel v. Rex-Noreco, Inc., 2 CCH Pov. L. Rep. ¶16,972 (D.Vt. Nov. 2, 1972) 36
Missouri v. Lewis, 101 U.S. 22 (1880) 32
Mitchell v. Oregon Frozen Foods Co., 361 U.S. 231 (1960) 13
Montagne v. Tinker, 197 So.2d 154 (La. App.), writ refused, 250 La. 916, 199 So.2d 921 (1967) 23

New Haven Inclusion Cases, 399 U.S. 392 (1970) 16
North Carolina v. Rice, 404 U.S. 244 (1971) 20

Oller v. Bank of America, 342 F. Supp. 21 (N.D. Cal. 1972) 36
Ownbey v. Morgan, 256 U.S. 94 (1921) 32

Pease v. Havelock National Bank, 351 F. Supp. 118 (D. Neb. 1972) 36

Queen City Broadcasting v. Wagenwest, Inc., 264 So. 2d 336 (La. App. 1972) 41

PAGE

Rene Implement Co. v. Perrin, 178 So. 181 (La. App. 1938) 24
Rosenfeld v. New Jersey, 408 U.S. 901 (1972) 35
Ross v. Brown Title Co., 356 F. Supp. 595 (E.D. La.), aff'd —— U.S. ——, 93 S. Ct. 2388 (1973) 13, 33, 39, 48, 49

Sanks v. Georgia, 401 U.S. 144 (1971) 21
Sniadach v. Family Finance Corp., 395 U.S. 337 (1969) 33
State ex rel. Knighton v. Derrybery, 188 La. 412, 177 So. 256 (1937) 40
Succession of Pavelka, 157 La. 480, 102 So. 579 (1924) 40

Talley v. Bradley, 177 So.2d 624 (La. App. 1965) 41
In re Trahan, 238 F. Supp. 620 (E.D. La.), aff'd 402 F.2d 796 (5th Cir. 1968), cert. denied 394 U.S. 930 (1969) 43
Tucker & Schonekas v. Al Dohmann Chevrolet, Inc., 260 So.2d 99 (La. App.), writ refused, 261 La. 1048, 262 So.2d 37 (1972) 41

United States v. Alaska S.S. Co., 253 U.S. 113 (1920) 20
United States v. Kras, 409 U.S. 418 (1973) 21

Wainwright v. City of New Orleans, 392 U.S. 598 (1968) 14
Wheeler v. Adams Company, 322 F. Supp. 645 (D. Md. 1971) 37
Wilson v. Lowrie, 156 La. 1062, 101 So. 549 (1924) 43
Wright v. Hughes, 254 So.2d 293 (La. App. 1971) ..39, 40, 41

Zion Mercantile Co. v. Pierce, 163 La. 477, 112 So. 371 (1927) 41

Statutory Materials

PAGE

Constitutional:

United States Constitution, Amendment XIV, §1 3

State Statutes:

Louisiana Civil Code:
Article 3227 ..... 2, 23, 24, 42, 43
Article 3228 44
Louisiana Code of Civil Procedure:
Article 1154 40
Article 2631 48
Article 2639 49
Article 2721 49
Article 2751 49
Article 3501 ..... 2, 23, 38, 39
Article 3506 ..... 3, 22, 23, 28, 34
Article 3508 7
Article 3510 ..... 22, 28, 38
Article 3571 ..... 3, 23, 24, 31, 38
Article 3576 28
Article 3601 18
La. Rev. Stats. §13:3881 ..... 8, 10

Other Authorities:

Clark and Lander, "Sniadach, Fuentes and Beyond: The Creditor Meets the Constitution", 59 VA. L. REV. 355 (1973) 33, 43
DAGGETT, LOUISIANA PRIVILEGES AND CHATTEL MORTGAGES (1942) 42, 43, 44
Hale, "The Direction of Litigation in the Consumer Credit Field", 28 BUS. LAW. 639 (1973) 36, 47
3 HOLDSWORTH, HISTORY OF ENGLISH LAW (1966) 35

PAGE

Johnson, "Attachment & Sequestration: Provisional Remedies Under the Louisiana Code of Civil Procedure," 38 TUL. L. REV. 1 (1963) 28, 29, 31, 40
Margolin, "Vendor's Privilege," 4 TUL. L. REV. 239 (1930) 41
McMahon, "The Historical Development of Executory Procedure in Louisiana," 32 TUL. L. REV. 551 (1958) 48
Millar, "Judicial Sequestration in Louisiana: Some Account of Its Sources," 30 TUL. L. REV. 201 (1956) 27, 28, 29, 30, 31, 32
Note, The Supreme Court, 1971 Term, 86 HARV. L. REV. 50 (1972) 37
Note: The Writ of Sequestration in Louisiana, 5 LA. L. REV. 102 (1942) 28
PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW (1956) 31
ROBERTSON AND KIRKHAM, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES (2d ed. Wolfson and Kurland 1951) 20, 26
YIANNOPOULOS, LOUISIANA CIVIL LAW TREATISE, PROPERTY (1967) 25, 42

IN THE

Supreme Court of the United States

October Term, 1973

No. 72-6160

LAWRENCE MITCHELL,

Petitioner,

v.

W.T. GRANT COMPANY,

Respondent.

RESPONDENT'S BRIEF

Opinions Below

The opinion of the Supreme Court of the State of Louisiana (App. 22-31) and the opinion concurring in part and dissenting in part (App. 32-35) are reported at 263 La. 627, 269 So. 2d 186 (1972). The decision of the Court of Appeal for the Fourth Circuit of the State of Louisiana (App. 20-21) is not reported. The judgment (App. 17) and the reasons for judgment (App. 18-19) of the First City Court for the City of New Orleans are also unreported.

Jurisdictional Statement

Petitioner purports to base jurisdiction of this Court to review the decision of the Supreme Court of the State of Louisiana by writ of certiorari upon 28 U.S.C. §1257(3). See Argument II (pp. 19-27, *infra*), for a further discussion in this regard.

Constitutional and Statutory Provisions Involved

Article 3227 of the Louisiana Civil Code provides in relevant part:

> "He who has sold to another any movable property, which is not paid for, has a preference on the price of his property, over the other creditors of the purchaser, whether the sale was made on a credit or without, if the property still remains in the possession of the purchaser.
>
> "So that although the vendor may have taken a note, bond or other acknowledgment from the buyer, he still enjoys the privilege." La. Civ. Code Ann. art. 3227 (West 1952)

Article 3501 of the Louisiana Code of Civil Procedure provides:

> "A writ of attachment or of sequestration shall issue only when the nature of the claim and the amount thereof, if any, and the grounds relied upon for the issuance of the writ clearly appear from specific facts shown by the petition verified by, or by the separate affidavit of, the petitioner, his counsel or agent.
>
> "The applicant shall furnish security as required by law for the payment of the damages the defendant may sustain when the writ is obtained wrongfully." La. Code Civ. Proc. Ann. art. 3501 (West 1961)

Article 3506 of the Louisiana Code of Civil Procedure provides:

> "The defendant by contradictory motion may obtain the dissolution of a writ of attachment or of sequestration, unless the plaintiff proves the grounds upon which the writ was issued. If the writ of attachment or of sequestration is dissolved, the action shall then proceed as if no writ had been issued.
>
> "The court may allow damages for the wrongful issuance of a writ of attachment or of sequestration on a motion to dissolve, or on a reconventional demand. Attorney's fees for the services rendered in connection with the dissolution of the writ may be included as an element of damages whether the writ is dissolved on motion or after trial on the merits." La. Code Civ. Proc. Ann. art. 3506 (West 1961)

Article 3571 of the Louisiana Code of Civil Procedure provides:

> "When one claims the ownership or right to possession of property, or a mortgage, lien, or privilege thereon, he may have the property seized under a writ of sequestration, if it is within the power of the defendant to conceal, dispose of, or waste the property or the revenues therefrom, or remove the property from the parish, during the pendency of the action." La. Code Civ. Proc. Ann. art. 3571 (West 1961)

Section One of the Fourteenth Amendment to the United States Constitution provides in relevant part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Questions Presented

1. Should the Court entertain this case and overturn a centuries-old Louisiana sequestration statute on the basis of a confused and otherwise patently inadequate record?

2. Where it has already been judicially determined after notice and hearing that respondent was, in fact, entitled to the sequestration of petitioner's goods, after petitioner conceded he had no valid defenses as to the sequestration, has petitioner's case regarding his claimed right to continued possession not been mooted?

3. Was the Supreme Court of Louisiana not correct in determining that the rule in *Fuentes* should not be extended in this case to the Louisiana law of sequestration, where the activities of the State have occurred only after review of the case by an impartial judicial officer, and upon a showing of special need for expeditious action?

Statement of the Case

Petitioner, Lawrence Mitchell, a resident of the City of New Orleans, Louisiana, over a two-year period of time purchased a refrigerator, a stove, a used stereo, and a washing machine (Appendix, hereinafter "App.", 3) from respondent, W. T. Grant Company. As of February 2, 1972, having paid less than one-quarter of his total principal obligation on these purchases, petitioner owed W. T. Grant Company a balance of $574.17, which sum was unpaid and past due (App. 3).

On that date, because petitioner was in severe financial difficulty (App. 18) and was in default on the payment of the purchase price (App. 3), respondent commenced a suit seeking recovery of the amount which petitioner had contracted to pay. The litigation was commenced in the First City Court for the City of New Orleans by the filing of a petition seeking a judgment in the amount of $574.17. In the petition, in order to safeguard the property during the pendency of the litigation, respondent also requested the court to protect their interest in the goods by ordering the issuance of a conservatory writ of sequestration directing the Constable to sequester those items of movable property which had previously been sold to petitioner (App. 3-4). In support of the petition, respondent submitted an affidavit by its credit manager who stated, under oath, that he had reason to fear that the defendant would "encumber, alienate or otherwise dispose of the merchandise described." (App. 3-4). On the same day, February 2, 1972, on an *ex parte* basis, respondent's petition and the supporting affidavit were presented to and reviewed by Judge Arthur J. O'Keefe in the First City Court for the City of New Orleans (App. 5). After making an independent determination as to the sufficiency of respondent's petition and affidavit, Judge O'Keefe ordered that a writ of sequestration be issued and directed the Constable to sequester and take into his possession the specified articles of merchandise (App. 5). In addition, as a condition of the issuance of the writ of sequestration Judge O'Keefe required that the plaintiff furnish a bond in a face amount approximately 50% in excess of the purchase price of the property, and such a bond was posted (App. 5).

Thereafter on the same day, February 2, 1972, the Deputy Clerk of the First City Court issued a citation addressed to petitioner and a writ of sequestration addressed to the Constable of the First City Court (App. 9-12). The writ directed the Constable to sequester the specified movable property. On the next day, February 3, 1972, the citation and the writ were received by the Constable's office together with the petition, the affidavit, the order and the bond (App. 11; Record, hereinafter "R.", 5).

Despite the claimed fundamental importance of factual issues relating to the sequence of the notice and the sequestration, there is considerable uncertainty as to these events in the record and in the proceedings below.[1] Originally, when the petitioner served his motion to dissolve the writ of sequestration, he contended that the property was seized by the Constable on February 7, 1972 and that he was not given notice of the pending litigation and the sequestration until that day (*e.g.*, App. 13-14). Throughout the history of this litigation petitioner has always maintained the same position.

Now for the first time in these proceedings, petitioner has significantly altered his story. Petitioner now claims on this appeal that it was not on February 7, but rather on February 18, some eleven days later, that the Constable served on petitioner the citation, the petition, and the writ of sequestration and seized the goods (Br. p. 4). In support of this new factual argument, petitioner has submitted

1. One minor example of such uncertainty is that, contrary to petitioner's assertion (Petitioner's Brief, hereinafter "Br.", p. 4), there is no evidence in the record that the citation and petition were served on petitioner at his residence.

copies of certain documents in an appendix to his brief. These documents would appear to establish that the sequestration by the Constable of the petitioner's goods did not take place until February 18. Though the new documents may support petitioner's claim of "a delay between the authorization of the seizure and the actual seizure" by the Constable (Br. p. 7), petitioner offers no support in the record for the proposition that the service of the citation, petition and writ took place at any time other than February 7. Indeed, the return of the Constable suggests that on February 7, respondent's citation and petition were served on petitioner at his domicile by substituted service, by service of a copy of the citation and petition on Mrs. Mitchell (R. 5, quoted at p. 17, *infra*). Thus the record in this case would appear to indicate that notice was first given petitioner on February 7, some eleven days prior to the time that the goods were seized (R. 5). Neither the parties nor the courts below have as yet addressed themselves to this discrepancy regarding the key operative dates. Indeed the first reference to this discrepancy in any document filed in this case appears in petitioner's brief on this appeal (Br. p. 4, n.2). Consequently, from the record in this case it is not possible to determine the actual sequence of events.

After the Constable's sequestration of the property, whatever the date in fact may have been, though petitioner could have posted a bond[2] to obtain the release and return of the goods, he did not do so. Not until March 3 did

2. The amount of the bond required would have been one and one-quarter the amount of the claim or one and one-quarter of the value of the property to be seized, whichever was lesser. La. Code Civ. Proc. Ann. art 3508 (West 1961).

petitioner commence a proceeding to challenge the propriety of the sequestration of the goods, by moving in the First City Court for the City of New Orleans to dissolve the writ of sequestration. In that motion petitioner unequivocally stated "On February 7, 1972, defendant's stove, refrigerator, and electric wash tub were seized pursuant to said writ of sequestration." (App. 13). In such motion, petitioner did not deny that he owed the money, nor that he was in default. Moreover, petitioner did not assert that he had any defense to the underlying claim on which the issuance of the writ of sequestration was predicated (App. 13). Significantly, he did not contest respondent's assertion of fear that petitioner would conceal or dispose of the property (App. 13-14). Rather petitioner asserted only (1) that the property seized was exempted from seizure under certain Louisiana statutory exemptions, La. Rev. Stat. §13:3881; and (2) that the seizure was in violation of the "Due Process Clauses of the Louisiana and United States Constitutions" (App. 13-14).

A hearing was thereafter held on the motion to dissolve, but not one scrap of evidence nor any testimony as to the manner of notice nor the relevant operative events of the sequestration and their sequence was introduced into the record by petitioner. Counsel for the respective parties entered into a joint stipulation to the effect that the vendor's lien did exist on the items sequestered (App. 16).

The court denied petitioner's motion to dissolve the writ of sequestration (App. 17). In its opinion, the court noted that the defendant was "experiencing severe financial difficulties." (App. 18). The court held that "the items seized

are not exempted from seizure in instances involving a Vendor's Lien and Privilege." (App. 19). The court observed that

> "* * * the Vendor's Lien and Privilege is a basic and essential right afforded a creditor under our law of Obligations. The right to provisional seizure is likewise a basic adjunct and necessary remedy to maintain and enforce the creditor's lien and privilege." (App. 19).

The court further held that "the provisional seizure enforced through sequestration was not a denial of due process and, in this instance, did not impinge upon defendant's constitutional rights." (App. 19). The court properly pointed out that "plaintiff insured defendant's right to due process by proceeding in accordance with Louisiana Law as opposed to any type of self-help seizure * * *" (App. 19).

Thereafter petitioner sought writs of prohibition, certiorari, mandamus, and review in the Louisiana Court of Appeal for the Fourth Circuit and asserted the same two grounds, namely that the property was exempt from seizure under the Louisiana statutory exemptions and that the sequestration violated the constitutional provisions. The Court of Appeal refused the writs and held that there was no "abuse of discretion or other error in the rulings complained of." (App. 20).

Thereafter the petitioner applied to the Supreme Court of the State of Louisiana for writs of prohibition, certiorari, and/or mandamus and review. The application was granted and the appeal heard by the Supreme Court of Louisiana, which affirmed the decision of the lower court. The Su-

preme Court concluded that the property seized was not subject to the statutory exemption under Section 3881 of Title 13 of the Louisiana Revised Statutes (App. 23-26). The Supreme Court further held that exemptions from seizure under a writ of *fieri facias* "were inapplicable to provisional remedies to assert privileges created by the Civil Code" and that such exemptions did not prevent seizure pursuant to a writ of sequestration (App. 25-26). As to the second part of petitioner's two-pronged attack on this sequestration, the court held that the rule announced in *Fuentes* v. *Shevin*, 407 U.S. 67 (1972) did not affect the result in the present case. The court held that the instant case fell within a clearly announced exception in *Fuentes, i.e.*, " 'cases in which a creditor could make a showing of immediate danger that a debtor will destroy or conceal disputed goods' " (App. 29), based upon the facts pleaded in the petition and affidavit requesting the issuance of the writ (App. 29). The court stressed the difference between the vendor's privilege and the common law conditional sale in that, under Louisiana law, a vendor's privilege is lost upon transfer of the property by the vendee (App. 30). The court further noted that the vendee has impliedly consented to the Louisiana vendor's right to preservation of the privilege (App. 29), and thus has implied knowledge of the limited nature of his continued right to possession after the purchase of movables upon credit (App. 29).

Thereafter petitioner moved for rehearing by the Supreme Court of Louisiana and that motion was denied on December 11, 1972, whereupon petitioner sought review in this Court by seeking a writ of certiorari.

Summary of Argument

This case involves a constitutional challenge to a centuries-old Louisiana statute. However the record on which this case comes before the Court is utterly confused. Petitioner is simply unable to support his claim of a constitutional violation by reference to evidence in the record.

Petitioner initially asserted that his goods were sequestered by the Constable on February 7, 1972 and that notice was not given until that date. Now on this appeal, relying upon unsworn, out-of-court statements in documents not admitted into evidence and not subjected to cross-examination, petitioner asserts that seizure did not occur until 11 days later. However, petitioner offers no proof either in the record or out of the record to support his contention that service of the citation and petition occurred at any time other than February 7. Where the record of the claimed constitutional violation is so unclear, this Court is being asked to make a constitutional ruling without an adequate development of the factual framework within which to evaluate the constitutional question. Because of the fundamental inadequacy of the record, the Court should vacate the writ of certiorari as improvidently granted.

This is not a case which involves a mistaken or unjustified deprivation of property. This is a case in which the petitioner can no longer assert even a colorable defense to the taking of his property. Petitioner has caused a hearing to be held to determine the propriety of the issuance of the writ of sequestration and the subsequent taking into custody of his movable property. At that hearing petitioner

had the opportunity to defend his right to continued possession and to assert all available defenses.

Under Louisiana law a vendor's privilege continues only as long as the underlying obligation is not extinguished. Petitioner now belatedly suggests that there may be defenses which might have the effect of extinguishing the vendor's privilege. However, petitioner has expressly conceded that there is a valid vendor's privilege as to this property. In so doing he has admitted that there are, in fact, no defenses.

Louisiana law places the burden of proof upon the party who sought the writ of sequestration. The respondent has met that burden of proof and has established that respondent was entitled to the issuance of the writ of sequestration. Return of this case for further hearing before a local court in Louisiana would serve no useful purpose, because a hearing as to the right to possession has been held, and that question has been finally decided against the petitioner.

The Louisiana law of sequestration and vendor's privilege are based upon the civil law and are related to no common law concept. The writ of sequestration is a conservatory writ designed to preserve and safeguard property during the pendency of a litigation.

Use of Louisiana's writ of sequestration was constitutionally permissible in this case in that it reflected a proper balancing of the relevant competing interests. Because a vendor's privilege may be easily extinguished by a vendee, a special situation arises in Louisiana when a vendee defaults and a vendor justifiably fears the loss of the vendor's privilege. Such a situation requires prompt

ex parte judicial action. Louisiana has a legitimate state interest in seeing to it that parties avail themselves of properly supervised state remedies rather than resort to the more perilous route of self-help. Louisiana law safeguards the interests of the vendee by requiring careful judicial scrutiny of the petition for a writ of sequestration and judicial evaluation of the probable merits for the issuance of the writ of sequestration prior to its issuance.

Where this Court has so recently reviewed and found constitutionally acceptable the substantially similar Louisiana remedy of executory process, this Court should affirm the decision of the lower court in the present case for the same reasons. *Ross* v. *Brown Title Co.*, —— U.S. ——, 93 S. Ct. 2388 (1973).

I

The centuries-old Louisiana sequestration statute should not be held unconstitutional in a case where the factual record is so patently unclear and inadequate.

Petitioner seeks a fundamental constitutional determination upon a centuries-old statute which has been relied upon throughout its history without constitutional challenge. This Court should be hesitant to upset such a statute in the absence of a clear showing of the alleged constitutional violation.

This Court has repeatedly expressed reluctance to render a potentially far-reaching decision in "view of ambiguities in the record." *Mitchell* v. *Oregon Frozen Foods Co.*, 361 U.S. 231 (1960). Here it is the factual record which lacks sufficient clarity for the Court to be in a position to

render a proper decision. *Massachusetts* v. *Painten,* 389 U.S. 560, 561 (1968). The record in the instant case unfortunately reflects the problem noted in *Wainwright* v. *City of New Orleans,* 392 U.S. 598-9 (1968) (Fortas, J., concurring):

> "* * * the facts necessary for evaluation of the dispositive constitutional issues in this case are not adequately presented by the record * * *."

Accord, McClanahan v. *Morauer & Hartzell,* 404 U.S. 16 (1971); *Kimbrough* v. *United States,* 364 U.S. 661 (1961) (lack of "sufficient clarity" in record became apparent after "a more thorough consideration of the record than was afforded when the petition for certiorari was granted"). Because full examination of the record in this case now discloses its inherent confusion, as in the above-cited cases this Court should dismiss the writ of certiorari as improvidently granted.

The principal factual issues in this case are when the petitioner first learned of the citation and petition and when the petitioner's movable property was sequestered by the Constable. The record of this case is such that the court does not have the operative facts necessary for proper evaluation of the constitutional issues. The record is a meager one. There was no trial. There were no findings of fact. Moreover, the record is as confused as it is abbreviated.

In *Fuentes* v. *Shevin,* 407 U.S. 67, 91 (1972), this Court noted that there might be an exception where there existed a need for prompt action. Petitioner devotes a considerable portion of his brief to demonstrate that there was no need for prompt action in this case (Br. pp. 36-39). Having

presented this case before the Supreme Court of Louisiana on a record indicating that "prompt action" did take place and that there was no delay from the time of the issuance of the writ of sequestration to the time of the seizure, it is outrageous for petitioner to present the case to this Court on significantly different facts. Now for the first time petitioner endeavors to establish that there was a substantial time lag between the issuance of the writ and the seizure (Br. p. 7).

Petitioner himself recognizes the lack of clarity and certainty regarding these issues. The record on which petitioner brings this case to the Supreme Court is so uncertain that petitioner has gone outside the record in search of documentary evidence on which to attempt to secure a factual basis for the assertion that he has been deprived of a constitutional right. It goes without saying that had the petitioner believed that the present record sufficed, the petitioner would not have endeavored to rely upon non-record evidence to shore up his case.

The documents on which petitioner relies, in fact, introduce a significant amount of uncertainty as to the sequence of events from February 2 to February 18. This confusion in the record arises principally out of the fact that petitioner has now fundamentally changed his story at this stage of the case. Initially petitioner took the position that the petition, citation, and writ of sequestration were served upon him on February 7, and that February 7 was the date when his goods were taken into custody (App. 13). Now, significantly departing from his own earlier assertions, petitioner in this Court for the first time contends that it was not until February 18 that the

goods were sequestered by the Constable (Br. p. 4). Petitioner's brief now asserts that "further inquiry into the record has resulted in the discovery that the date of service and seizure was February 18, 1972." (Br. p. 4, n. 2).

Petitioner in an effort to support this proposition and bolster his case has gone far outside the record. Petitioner in this Court now relies upon documents, which though purporting to be public records, were not introduced into evidence and are not a part of the record of this case. (Br. appendix B and C).[3] These documents contain unsworn statements not subjected to cross-examination in any proceeding below and should not be considered. *New Haven Inclusion Cases,* 399 U.S. 392, 450, n. 66 (1970). Moreover, these new documents are equivocal and thus further muddy the waters in this case in which the record is already so unclear.[4]

The documents relied on for this new contention that service and seizure was on February 18 appear to support only the contention as to the date of seizure. Appendix C purports to document the taking of the property on February 18 and indicates the "date seized" as February

3. Petitioner has endeavored to embellish the meager record by using these new documents from outside the record to make the irrelevant argument that the goods have gone into the respondent's possession (Br. pp. 4, 19). The contention hardly deserves response, because under Louisiana law, the location of movable goods sequestered matters not. The keeper of the property, regardless of identity, has a fiduciary obligation to protect and preserve the property. *Bickham Motors* v. *Crain,* 185 So.2d 271 (La. App. 1966).

4. Thus, for example, the document which petitioner has offered as Appendix B to his brief is a document which states "Please Take Notice—That by virtue of writ of Sequestration issued in the above mentioned suit, *I have seized and taken into my possession* the following described property, [namely the property in this case]." (emphasis added). That document is dated February 3. Petitioner offers no explanation of the variance between this apparent February 3 date of seizure, and the February 18 date of seizure which he asserts.

18. As to service of the citation and petition in this lawsuit and notice of the prospective sequestration, this document is silent. On the other hand, Appendix B purports to be only a notice after seizure that the specified movable goods had been taken. Thus this new document does no more than support the claim as to the date of the sequestration of the goods. Consequently, petitioner's new documents do not tend to substantiate the contention that petitioner received notice of the instant litigation at any time other than February 7.

More significantly, there is evidence in the record tending to show that petitioner received notice of respondent's proceedings against him on February 7 by means of a substituted service (R. 5).[5] Petitioner acknowledges this possibility, but argues that if there were such notice, it was insufficient because it was not required by statute (Br. p. 8). Such an argument represents a funda-

5. One of the Constable's Returns stamped on the citation reads as follows:

"CONSTABLE'S RETURN:

"Received on *FEB 3 1972*
and on *FEB 7 1972*
"I served a true copy of the within citation and accompanying petition on *Lawrence Mitchell*
defendant herein serving same at his domicile *7611 Chef Menteur Hy. (Apt. A-10)* Street in the hands of *Mrs. Lawrence Mitchell (wife)*
person of SUITABLE AGE AND DISCRETION RESIDING therein as a member of his domiciliary Establishment. Defendant being absent at time of said service. All these facts I learned by interrogating said person.

"Deputy Constable"

(Record 5). Though this return has been crossed out, it tends to support petitioner's original assertion that he was first notified of the proceeding on February 7.

mental departure from the case presented to the Louisiana Supreme Court. Furthermore, the new documents relied on by petitioner cast no light whatsoever on this clear suggestion in the record of notice by substituted service.

Petitioner now seeks to abandon his original claim that he received notice and that the goods were seized on February 7. However, petitioner offers this Court no clear explanation of the evidence which led him in the first instance to conclude that February 7 was the date on which these two events occurred, nor does petitioner offer any convincing reason why he now rejects his original basis for having asserted that date in the first instance.

The question that petitioner cannot resolve, despite his resort to documents outside the record, is when and in what manner petitioner was first served with notice of these proceedings. Petitioner's assertion that the citations and petitions are served at the time of the seizure is based neither on evidence nor citation to the record (Br. p. 20). If petitioner was correct initially in asserting that February 7 was the date of service, then petitioner had ample opportunity, an 11-day period, within which to obtain a hearing to dissolve the writ[6] and to prevent the sequestration of the goods, which he claims did not take place until February 18.

Because this factual issue has been raised for the first time in the Supreme Court, respondent has been deprived of an opportunity to explore the reasons for the claimed

6. Equally open to petitioner during such an interim may have been the route of injunctive relief. La. Code Civ. Proc. Ann. art. 3601 (West 1961).

delay in service of process and seizure of the movable property.[7]

Petitioner's approach to the constitutional issues on this record makes it abundantly clear that what is sought from this Court is an advisory opinion. In effect, petitioner asks the Court to review the statutes, without regard to the facts and the record of this particular case.

Whatever the sequence of events, the record in this case is not an adequate record on which the Court may intelligently assess the claimed constitutional issues, and accordingly the Court should vacate the writ of certiorari as improvidently granted.

II

Where there was a determination below adverse to petitioner's claim to continued possession of movable property, petitioner can assert no injury to himself for failure to have had a prior hearing.

Petitioner asserts that he has been deprived of property without having had a proper prior hearing. This case however, as contrasted with *Fuentes, supra,* involves neither a mistaken, nor an unjustified deprivation of property, nor the possibility of one. Rather the petitioner has no defense whatsoever to the taking of his property. A full and fair hearing brought on by petitioner has already been

7. Respondent has been foreclosed from inquiring into this issue to determine, for example, whether petitioner was endeavoring to avoid service of process and to avoid payment of his just obligations, which fact might tend to evidence respondent's need to have the movable property sequestered. Efforts on the part of the petitioner to avoid service of process, of course, would bear upon respondent's fears as to the continued security of their vendor's privilege.

held to determine the rights of the parties with respect to the issuance of the writ of sequestration and the taking into custody of the movable property. Petitioner appeared and had the opportunity to assert his right to possession of the goods and the dissolution of the writ of sequestration under any theory of law he chose. He has been heard and the issues have been determined against him.

Thus, because of the absence of a genuine controversy, this case comes before the Court with a fundamental jurisdictional defect. *United States* v. *Alaska S. S. Co.*, 253 U.S. 113, 116 (1920). Of course, a cause may become moot in part if only certain issues alone have been irrevocably disposed of. ROBERTSON AND KIRKHAM, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES, §279 (2d ed. Wolfson and Kurland 1951). This Court stated in *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971):

> "Early in its history, this Court held that it had no power to issue advisory opinions, *Hayburn's Case*, 2 Dall. 409 (1792) * * * and it has frequently repeated that federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them. * * * To be cognizable in a federal court, a suit 'must be definite and concrete, touching the legal relations of parties having adverse legal interests. * * * It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. * * *' "

This Court has repeatedly expressed its reluctance to pass upon the constitutionality of a statute unless a decision of the precise constitutional issue is a necessity in that

case. *Board of Regents* v. *Roth,* 408 U.S. 564, 574 (1972) (issue not before the Court). Likewise in *Sanks* v. *Georgia,* 401 U.S. 144 (1971) after the right to possession of premises had been resolved, there remained no controversy, the case was moot, and the appeal dismissed. *Accord, Hernandez* v. *European Auto Collision, Inc.,* —— F.2d —— (2d Cir. June 29, 1973) (mechanic's lien; failure to dispute underlying obligation rendered moot a constitutional challenge to detention provisions of New York Lien Law). This Court did not allude to this issue in *Jennings* v. *Mahoney,* 404 U.S. 25 (1971), where a claimed deprivation of a driver's license without a prior hearing was affirmed based upon a subsequent hearing.

Even in cases involving procedural due process where a constitutional decision is necessary, the Court has expressed its reluctance to do more than decide only those narrow constitutional issues before it. *Boddie* v. *Connecticut,* 401 U.S. 371 (1971); *United States* v. *Kras,* 409 U.S. 418 (1973).

The petitioner has by his own action mooted this case. It was petitioner, himself, who brought this matter before the Louisiana trial court for a hearing which determined against him the issue of his right to continued possession of the property. Since the issue has been determined against the petitioner, it would serve no purpose at all to remand this case for further hearing at the trial court level. Because the determination has been made, petitioner's claim that his rights have been violated is asserted only as an abstract proposition.

At the hearing to dissolve the writ of sequestration, had petitioner's defenses been justified, petitioner had the

right to prevail before the local court and to have the writ dissolved. Article 3506 governs the motion made by petitioner to dissolve the writ and imposes upon a plaintiff a burden of proof requiring him to prove "the grounds upon which the writ was issued." La. Code Civ. Proc. Ann. art. 3506 (West 1961). Respondent met that burden and has established that the writ of sequestration was properly issued (App. 17).

Though petitioner argues that he was not entitled to go into the merits of the claim against him upon the hearing on the motion to dissolve the writ (Br. p. 24),[8] it is unquestionably clear that at the hearing on that motion the petitioner was entitled to raise any issue bearing upon "the grounds for the auxiliary remedy," *i.e.*, the issuance of the writ. La. Code Civ. Proc. Ann. art. 3506, Comment *c*. While it is not open to the vendor on a motion to dissolve the writ of sequestration to secure a final adjudication of the underlying claim (La. Code Civ. Proc. Ann. art. 3506, 3510), the vendee has the right at that hearing to raise all issues relevant to the propriety of the issuance of the writ of sequestration. *See, e.g., Bates-Crumley Chevrolet Co.* v. *Brown*, 141 So. 436 (La. App. 1932) (issue

8. This Court has previously considered a similar argument that a party was not permitted to raise defenses on a hearing as to possession. In *Lindsey* v. *Normet*, 405 U.S. 56 (1972) under Oregon law the hearing was limited to the sole issue of whether a tenant had paid the rent. Plaintiff contended that the statute denied him due process of law by not allowing him to raise affirmative defenses. This Court rejected the argument and held that the tenant's rent obligation and duties imposed on a landlord were completely independent as a matter of Oregon real estate law. Likewise if defenses now asserted by petitioner could not have been heard on the hearing to dissolve the writ, the defenses would be independent as a matter of Louisiana law and thus constitutionally irrelevant under *Lindsey*, *supra*. If the defenses are not irrelevant, as shown pp. 23-25, *infra*, then they should have been raised at the hearing to dissolve the writ.

of payment decided on motion to dissolve); *Montagne* v. *Tinker*, 197 So.2d 154, 157 (La. App.), writ refused, 250 La. 916, 199 So.2d 921 (1967). Of necessity, the trial court made a finding on the validity of the issuance of the writ of sequestration. Though the petitioner may assert that he intended to try only the constitutional issue at the hearing below, the finding under Louisiana law was not limited to the constitutional issue. After having heard the petitioner's arguments, the trial court of necessity determined that the grounds for the taking of the property by the Constable from the possession of the petitioner had been established (App. 17; La. Code Civ. Proc. Ann. art. 3506).[9]

In order to meet the burden of establishing that a writ of sequestration was properly issued, a vendor must establish the following: (1) the existence of a valid vendor's lien; (2) the existence of a debt arising in connection with sale on credit of particular goods; (3) a default by the vendee in payment for those goods permitting an action to be brought; (4) the absence of defenses extinguishing the vendor's privilege; (5) the vendee's actual possession of the goods; and (6) the power of the defendant to conceal, dispose of, or waste the property. La. Code Civ. Proc. Ann. art. 3501, 3506, 3571 (West 1960); La. Civ. Code Ann. art. 3227 (West 1960).

Petitioner misperceives the extent to which challenge may be made to the issuance of a writ of sequestration at a hearing upon a motion to dissolve the writ. A writ of

9. This case differs significantly from the situation in *Fuentes*, *supra*, because there a significant property interest remained at stake. In *Fuentes* there had not been a hearing on the merits of the taking. The Court in *Fuentes* stated "It is enough that the right to continued possession of the goods was open to *some* dispute at a hearing. * * *" *Fuentes* v. *Shevin*, 407 U.S. at 67, 87, fn. 17 (1972). Here no such dispute remains.

sequestration may be issued "when one claims the ownership or right to possession of property * * * or a privilege thereon * * *." La. Code Civ. Proc. Ann. art. 3571 (West 1961).[10] The existence of such a privilege is governed by Article 3227 of the Louisiana Civil Code which accords a privilege to one "who has sold to another any movable property, which is not paid for * * *." In short, the privilege is extinguished upon payment of the debt owing the vendor. It is but to state the obvious that absent a debt to the vendor, there can be no vendor's privilege. Thus in the event that the property is paid for or there is no longer any sum owing to the vendor, there is no underlying privilege upon which the vendor can base his petition to sequester the property. *Bates-Crumley Chevrolet Co.* v. *Brown*, 141 So. 436 (La. App. 1932) (acceptance of a note extinguished the privilege).

The Louisiana case law is completely in accord with the foregoing analysis. Thus, in *Louisiana State Rice Milling Co., Inc.* v. *Potter*, 179 La. 197, 153 So. 690 (1934) the vendee properly raised the defense that there had been no sale. In *Herbert* v. *Hurwitz Mintz Furniture Co.*, 21 So.2d 638 (La. App. 1945), issuance of the writ was challenged on the ground that the debt was no longer due and payable. *Rene Implement Co.* v. *Perrin*, 178 So. 181, 186 (La. App. 1938), involved a challenge to the issuance of the writ on the ground that the supporting affidavit was false. *Accord, Cottonport Bank* v. *Dunn*, 21 So.2d 525 (La. App.

10. This Court in *Fuentes*, 407 U.S. at 97, held that the hearing to determine the right to possession of the goods requires that the probable validity of the underlying claim against the debtor be determined. This determination is implicitly required by the statutes governing the issuance of the writ of sequestration and the use of the motion to dissolve it. La. Code Civ. Proc. Ann. art. 3506 (West 1961).

1945) (appeal of denial of motion to dissolve writ; remand for evidence as to manner of plaintiff's acquisition of note and the arrangement among the parties). See also *American Steel Building Co.* v. *Brezner,* 158 So.2d 623 (La. App. 1963). In short, any meritorious defense may be used to attack sequestration at the hearing to dissolve it.

Here the petitioner had the right at that hearing to raise the issue of whether in fact there had been a mistaken deprivation, but he could show no mistaken deprivation. At the hearing petitioner did not contend that he did not owe the money, nor did he contend that he was not in default (App. 13-14, 16). He did not assert that there was any dispute between him and the respondent (App. 13-14, 16). He did not assert that there was any defense available to him which might defeat the claim of the respondent (App. 13-14, 16).

Even more important is the concession which the petitioner has made on the record in this case. At the hearing on the motion to dissolve the writ, the petitioner conceded that in fact there was a valid vendor's lien on the goods. By making such a concession the petitioner has implicitly admitted that there is no valid defense to upset the claim against him and his property, because under the law of Louisiana, a vendor's privilege exists only so long as the vendor is entitled to be paid. *Bates-Crumley Chevrolet Co.* v. *Brown,* 141 So. 436 (La. App. 1932); YIANNOPOULOS, LOUISIANA CIVIL LAW TREATISE, PROPERTY §§56, 106 (1967).

At the hearing on the motion to dissolve the writ petitioner had ample opportunity to advance legal theories upon which it might be contended that the vendor's privi-

lege had been extinguished. Because petitioner has not raised any such issues and has conceded that vendor's privilege has not been extinguished, the defenses so belatedly contrived and asserted for the first time in this Court are shown to have no substance.[11]

Since petitioner has made such a concession and since the local court has made the express judicial determination that respondent demonstrated a justifiable need to cause petitioner's goods to be sequestered and that petitioner is not entitled to possession of the goods, a return of this case for a hearing in the local court in Louisiana would be a nullity.[12] In short, the question petitioner seeks to have reviewed is wholly abstract. To make a determination in this case that the Louisiana law of sequestration is uncon-

11. Petitioner may well argue that, at a new hearing at the trial court level regarding petitioner's right to continued possession of the goods, he would raise defenses which were not raised at the initial hearing. He might argue that at the initial hearing the only defenses raised related to the statutory exemption of the property and the constitutional right to notice and hearing. But what this Court said in *Fuentes* was that a party was entitled to an opportunity for a hearing. Petitioner has had that opportunity for a full hearing, and at the hearing could have raised the defenses he now alludes to for the very first time. There is no reason to require a second hearing to consider the same ultimate issue raised at the first, namely, the petitioner's right to possession of the goods. The right to raise those additional hypothetical defenses is foreclosed to him. Since petitioner made an intelligent and knowing choice of which defenses to raise at the possessory hearing, he can properly be held to have waived his right to raise other defenses. *Johnson* v. *Zerbst*, 304 U.S. 458 (1938).

12. Petitioner may contend he is entitled to damages if the writ were dissolved. Such a question of damages is merely incidental to the primary issue. Where as here the main issue is moot, the peripheral question of potential recovery of damages or costs does not transform this case into one where there is an actual case or controversy. ROBERTSON AND KIRKHAM, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES §279 (2d ed. Wolfson and Kurland 1951).

stitutional would be to render an advisory opinion, which would have no impact on the rights of the particular parties in this case.

III

There is no good reason to extend the rule in *Fuentes* to the Louisiana law of sequestration.

A. The Louisiana law, based upon the Civil Code and stemming from entirely different legal traditions, involves different legal concepts, and therefore should be accorded separate treatment.

The *Fuentes* case involved the common law writ of replevin. On this appeal, petitioner proceeds on the mistaken assumption that the ruling in the *Fuentes* case is automatically applicable to the Louisiana writ of sequestration. Such is not the case. A careful analysis shows that there are significant actual, historical and conceptional differences between the common law writ of replevin and the civil law writ of sequestration.

The following discussion demonstrates the fundamental underlying differences between the two types of procedures and the historical origins of the writ of sequestration in Louisiana so blatantly ignored by petitioner's brief.

The procedure of sequestration is a preliminary measure of interim security. Millar, *"Judicial Sequestration in Louisiana: Some Account of Its Sources."* 30 TUL. L. REV. 201 (1956) [hereinafter "Millar, *Judicial Sequestration*"]. One primary difference between the writ of replevin and the Louisiana writ of sequestration is that

the former is intended to establish the immediate right to possession, while the latter is not. Indeed, the very terminology used is illustrative of the differences: the writ of sequestration is a "conservatory writ". Johnson, *Attachment and Sequestration: Provisional Remedies Under the Louisiana Code of Civil Procedure*, 38 TUL. L. REV. 1 (1963) [hereinafter, "Johnson"]. The fundamental concept underlying the writ of sequestration is that it is exclusively intended to preserve property from waste or concealment, while a lawsuit is pending, for the mutual benefit of both the vendor and the vendee. Johnson, *supra*, at 3 (1963); Note *The Writ of Sequestration in Louisiana*, 5 LA. L. REV. 102 (1942). If the vendor prevails on the merits, then the judicial sale thereafter will yield greater proceeds, thus reducing any deficiency that the vendee would otherwise have to pay. If the vendee prevails on the merits, then he can be restored to his previous position by the award of damages sustained for loss of use of property, and counsel fees. La. Code Civ. Proc. Ann. art. 3506 (West 1961). The purpose of the writ of sequestration is the "express safeguarding of property as an end in itself * * *." See, Millar, *Judicial Sequestration* at 233.[13] The traditional notion of

13. To be sure, the Louisiana Code of Civil Procedure does now permit "release" of movable property to a plaintiff 10 days after the seizure of the property in the event that the defendant has chosen not to post the bond. La. Code Civ. Proc. Ann. art. 3507, 3576 (West 1961). But release of the property within the meaning of these provisions is quite limited. Title in the goods does not reside in the plaintiff under such circumstances. Indeed, only after a final judgment is obtained in the action can the property seized be sold to satisfy the claim. Louisiana Code of Civ. Proc. Ann., art. 3510 (West 1961). Furthermore, even after the property has been placed in the plaintiff's custody, the plaintiff is only the keeper or custodian of the goods, which are still in the constructive possession of the Louisiana courts. *See, Bickham Motors Inc.* v. *Crain*, 185 So.2d 271 (La. App. 1966).

sequestration does not involve taking property from one person and giving it to another, but rather the property is taken into legal custody to conserve it during the pendency of a dispute. Johnson, *supra* at 4.

By way of contrast the "ancient possessory action" of replevin is a method by which a determination of the right to possession may be immediately made. *Fuentes* v. *Shevin*, 407 U.S. 67, 79 (1972). Indeed, the historic remedy involved the taking of goods from the possession of one party by a sheriff and placing them in the possession of another party, 3 HOLDSWORTH, HISTORY OF ENGLISH LAW, 278-286 (1966).

While some Louisiana procedures draw upon common law ancestry (such as the law of attachment), the institution of the writ of sequestration "owes nothing to Anglo-American law, resting as it does upon principles finding their origin in the law of Rome," and its development excluded "the intrusion of Anglo-American ideas out of harmony with the system at large." Millar, *Judicial Sequestration*, at 227, 232. The institution of sequestration existed both in French and Spanish systems and derived originally from the Roman law. *Id.* at 206[14] The institution of ju-

14. Under Roman law, one determinant of its application was the circumstance that "the defendant possessor was a *persona suspecta*—an expression which seems to imply untrustworthiness not only from an economic standpoint but also from the standpoint of his moral character and habit of life. A second principal determinant * * * was the necessity of preserving the property in suit from waste or deterioration." Millar, *Judicial Sequestration*, at 206.

Later Roman law recognized sequestration to be available *inter alia*, "in the case of an action for the recovery of a movable, where the possessor is a *persona suspecta*, i.e., one who is without substantial estate and is open to the suspicion that he will dissipate the property."

[*footnote continued on next page*]

dicial sequestration became a part of the Louisiana Code of 1808, under the name of "judicial deposit". *Id.* at 216. That same author notes the existence of sequestration under Spanish law in New Orleans, citing the early case of *Pitot* v. *Elmes,* 1 Mart. (O.S.) 79 (1809); *Id.* at 217. When the property was taken from one party, it was put in the hands of sequestrators until the right of a particular party to possession was proven. *Id.*

In the Louisiana Code of Practice of 1825, judicial sequestration was defined as follows:

> "Art. 269. Sequestration is a mandate of the court ordering the sheriff in certain cases to take into his possession, and to keep, a thing of which another person has the possession, until after the decision of a suit, in order that it be delivered to him who shall be adjudged entitled to have the property or possession of the thing. This is what is properly called a judicial sequestration."

Millar, *Judicial Sequestration,* at 218-219.

In *Fuentes,* this Court observed that significant differences had developed distinguishing the modern law of replevin from its common law ancestry. 407 U.S. at 78. Replevin had originally been used by a tenant to obtain repossession of goods wrongfully taken from his posses-

---

Later, it appears that sequestration of property was available among other situations in a controversy concerning movables where it was to be feared "that the parties will resort to violence and cause a decided disturbance of the peace." *Id.* at 208.

Likewise in the French law of the 16th and 17th centuries, according to Millar, citing French sources of that era, sequestration was in order where there was an action concerning the possession of things and it was to be feared that the parties would arrive at violence, and more particularly in regard to a movable where the possessor was suspected of changing its nature or being about to carry it off. *Id.* at 213-216.

sion by a landlord. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 367-369 (1956). That procedure was altered in more recent times to a procedure whereby one party could simply obtain possession of property from another. *Fuentes* v. *Shevin*, 407 U.S. 67, 79 (1972).

In straining to bring this case within the narrow boundaries of the *Fuentes* case, petitioner tries to show that the modern Louisiana law of sequestration likewise departs radically from its Roman, French and Spanish traditions in that a party need no longer plead his reason to fear that the movable property might be ill-treated or sent out of the jurisdiction (Br. pp. 24-25). Nothing could be more inaccurate. Sequestration "has remained in Louisiana law in substantially the same form from the beginnings, retaining * * * its 'essential integrity' and 'long-standing virtues' * * *." Johnson, *supra*, at 4. Petitioner fails to acknowledge that as long ago as 1826 a plaintiff could "obtain a sequestration *in all cases where he has a lien or privilege on property, upon complying with the requisitions of the law.*" La. Code Prac. art. 275(7), quoted in Millar, *Judicial Sequestration*, at 223. The tradition of this ancient provision is reflected in the law today. La. Code Civ. Proc. Ann. art. 3571 (West 1961).

The Constitution permits differences between the civil law and common law systems, and this Court has implicitly acknowledged those differences as necessitating different procedural systems. Yet, in effect, petitioner argues that the Louisiana statute must automatically be struck down because of its departure from procedural requisites applicable at common law. This Court, however, has recognized the flexibility of the Constitution to tolerate differences

among the fundamentally different types of legal systems and traditions.

Nearly a century ago this Court stated:

> "[W]hile we take just pride in the principles and institutions of the common law, we are not to forget that in lands where other systems of jurisprudence prevail, the ideas and processes of civil justice are also not unknown. Due process of law, in spite of the absolutism of continental governments, is not alien to that code which survived the Roman Empire as the foundation of modern civilization in Europe * * *." *Hurtado* v. *California*, 110 U.S. 516, 531 (1884).

Accord, Bianchi v. *Morales*, 262 U.S. 170 (1923) (where civil law summary foreclosure procedures were sustained against a challenge that they violated due process under the Fourteenth Amendment); *Missouri* v. *Lewis*, 101 U.S. 22 (1880).

Furthermore, in *Ownbey* v. *Morgan*, 256 U.S. 94, 110-112 (1921), this Court stated:

> "The due process clause does not impose upon the states a duty to establish ideal systems for the administration of justice, with every modern improvement . . .
>
> * * *
>
> However desirable it is that the old forms of procedure be improved with the progress of time, it cannot rightly be said that the Fourteenth Amendment furnishes a universal and self-executing remedy."

Sequestration, an ancient conservatory remedy, with roots in the Roman, French, and Spanish law, "appears to have worked well and satisfied fully the demands made upon it. Few State procedural institutions, in our judgment, have experienced less complaint." Millar, *Judicial Seques-*

tration, at 232. In view of the different purpose and concept involved in the writ of sequestration and its civil law context it should be accorded different judicial treatment.

B. The Supreme Court of Louisiana properly held that the sequestration in the present case did not violate constitutional requirements of due process.

The petitioner proceeds from the mistaken assumption that *Fuentes* condemned all taking of property by a creditor remedy on an *ex parte* basis. But the decision in *Fuentes* was far more narrow. See generally Clark and Lander, *Sniadach, Fuentes and Beyond: The Creditor Meets the Constitution,* 59 VA. L. REV. 355 (1973).

A number of creditor remedies have been considered by the Court and the remedies have not been held unconstitutional *per se.* This Court in *Fuentes* did not hold the writ of replevin unconstitutional. In *Sniadach* v. *Family Finance Corp.,* 395 U.S. 337 (1969) this Court did not hold that garnishment was unconstitutional. In *Ross* v. *Brown Title Company,* 356 F.Supp. 595 (E.D.La.), *aff'd.* —— U.S. ——, 93 S.Ct. 2388 (1973) this Court affirmed the district court decision upholding the constitutionality of the Louisiana creditor remedy of executory process. In *D. H. Overmyer Co.* v. *Frick Co.,* 405 U.S. 174 (1972) this Court upheld the use of the cognovit note and execution on such a note.

As the Supreme Court in such cases did not hold that use of such creditor remedies was unconstitutional, use of the writ of sequestration is likewise not unconstitutional

per se. In essence, *Fuentes* requires that the rights of a debtor be adequately safeguarded by the State prior to issuance of a writ and seizure of the goods. The Court in *Fuentes* stated:

> "We do not question the power of a State to seize goods before a final judgment in order to protect the security interests of creditors so long as those creditors have tested their claim to the goods through the process of a fair prior hearing. The nature and form of such prior hearings, moreover, are legitimately open to many potential variations and are a subject, at this point, for legislation—not adjudication." 407 U.S. at 96-97.

This standard has been more than adequately complied with in this case, because prior to the issuance of the writ, respondent was obliged to submit its petition, affidavit, and bond to the court, for the court's scrutiny.[15]

Where as here, there is an important state interest involved, *i.e.,* Louisiana's centuries-old vendor's privilege, the State may engage in a limited balancing process. Because petitioner does not like the manner in which the State's balancing has come out, petitioner jumps to the unwarranted conclusion that in effect no balancing is permitted by the State (Br. pp. 12-13), even though considerable differences from those in the common law jurisdiction are here present.

The balancing engaged in by the Louisiana Supreme Court took into account all the relevant interests, not just

15. Of course, after the issuance of the writ, respondent was obliged to bear the burden of proof for its issuance or answer in damages for the improper issue of the writ. La. Code Civ. Proc. Ann. art. 3506 (West 1961).

the one that the petitioner thinks ought to be included, and the court properly concluded that the petitioner was not deprived of due process of law.

This Court has stated that:

> "* * * consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 895 (1961).

Analysis of the threefold interests in the proper use of sequestration, that of the State, the vendee, and the vendor, is instructive. Regarding the use of the vendor's privilege and the writ of sequestration, Louisiana has a legitimate state interest in seeing that private disputes are resolved through the orderly process of law and without resort to self-help with its unlimited potential for violence and bloodshed. Obviously, Louisiana has a significant interest in maintaining the public peace within its boundaries. One means of maintaining public peace is by discouraging the use of extra-legal self-help. 3 HOLDSWORTH, A HISTORY OF ENGLISH LAW 278 (1966); *see* n. 14 *supra*. Indeed, Chief Justice Burger has said in *Rosenfeld* v. *New Jersey*, 408 U.S. 901, 902 (1972) (dissenting opinion):

> "The important underlying aspect of these cases goes really to the function of law in preserving ordered liberty. Civilized people refrain from 'taking the law into their own hands' because of a belief that the government, as their agent, will take care of the problem in an organized, orderly way * * *."

Resort to self-help is no longer an abstract question. Though the issue is not settled, a number of courts have

recently held that the resort to the use of self-help does not violate the constitutional requirements of the Fourteenth Amendment. *See, e.g.*, Justice White's dissent in *Fuentes* v. *Shevin*, 407 U.S. 67, 102 (1972); *Brown* v. *United States National Bank*, 509 P.2d 442 (Ore. 1973); *Pease* v. *Havelock National Bank*, 351 F. Supp. 118 (D. Neb. 1972); *Kirksey* v. *Theilig*, 351 F.Supp. 727 (D. Col. 1972); *Oller* v. *Bank of America*, 342 F.Supp. 21 (N.D. Cal. 1972); *Messenger* v. *Sandy Motors, Inc.*, 121 N.J. Super. 1, 295 A. 2d 402 (1972); *Greene* v. *The First National Exchange Bank of Virginia*, 348 F.Supp. 672 (W.D. Va. 1972); *McCormick* v. *First National Bank*, 322 F.Supp. 604 (S.D. Fla. 1971); *Brinkley* v. *Northside Motors*, 42 U.S. L.W. 2115 (Fla. Sup. Ct. July 31, 1973); *contra*, *Adams* v. *Egley*, 338 F.Supp. 614 (S.D. Cal. 1972), appeal docketed No. 72-1484 *sub nom. Adams* v. *Southern California First National Bank* (9th Cir.); *Michel* v. *Rex-Noreco, Inc.*, 2 CCH Pov. L. Rep. ¶16,972 (D. Vt. Nov. 1, 1972); *Boland* v. *Essex County Bank and Trust Co.*, 42 U.S.L.W. 2116 (D. Mass. Aug. 15, 1973). The Louisiana Supreme Court must have been mindful of the trial court's observation (App. 19) that judicial supervision of the use of the writ of sequestration affords the vendee considerable more protection than a vendor's resort to self-help. Indeed, it has been noted that

> "the participation of a State official increases the likelihood that the recovery would be conducted in an orderly and peaceable fashion, and reduces the likelihood that the wrong article would be seized or that the debtor's opportunity to get his item back would be impeded or made unreasonably difficult." Hale, *The Direction of Litigation in the Consumer Credit Field*, 28 Bus. Law. 639, 650 (1973).

Of fundamental concern in *Fuentes* was the protection of a debtor from the improper invocation of state power by a creditor. However, Louisiana's prior impartial judicial scrutiny of the application for the writ of sequestration affords the vendee sufficient protection against wrongful or mistaken deprivations. The vendee's interest is more than adequately protected by a disinterested judge who must carefully review the adequacy of the assertions presented in the petition seeking the writ of sequestration.

Louisiana's control of the use of its power in this case is quite different from the situation in *Fuentes* where the Court stated:

> "The statutes, moreover, abdicate effective state control over state power. Private parties, serving their own private advantage, may unilaterally invoke state power to replevy goods from another. No state official participates in the decision to seek a writ; no state official reviews the basis for the claim to repossession; and no state official evaluates the need for immediate seizure. There is not even a requirement that the plaintiff provide any information to the court on these matters. The State acts largely in the dark." 407 U.S. at 93.

Louisiana has special safeguards surrounding the use of its writ of sequestration which differ significantly from procedures involving replevin in other states. Note, *The Supreme Court, 1971 Term*, 86 HARV. L. REV. 50, 86, n. 7 (1972).[16] The Louisiana Supreme Court in examining its closely-related executory process statute contrasted its procedures with those in *Fuentes*:

> "The Florida statute authorized the issuance of the writ of replevin by a clerk of court, upon the

16. However, *Wheeler* v. *Adams Company*, 322 F.Supp. 645 (D. Md. 1971) discusses a replevin situation where the writ may be issued only after a showing before a judge.

creditor's unsupported allegation that he was entitled to the writ, with actual dispossession of the debtor immediately upon service of the writ.

"The Pennsylvania statute authorized the issuance of the writ of replevin by a prothonotary, upon the plaintiff's unsupported allegation that he was entitled to the writ, with actual dispossession of the debtor immediately upon service of the writ.

"Among the objectionable features of the statutes identified in the decision was the issuance of the writ of replevin by one not a state official, its issuance solely upon the ex parte allegation of the creditor that he is entitled to the goods seized, the omission of notice to the debtor, and the denial of an opportunity to be heard prior to actual dispossession.

"An examination of Louisiana procedures points up valid distinctions between them and those of Florida and Pennsylvania. A writ * * * in Louisiana is issued by a judge of a court of proper venue. To justify the issuance of the writ, the plaintiff must make a proper showing to the reviewing judge." *Buckner* v. *Carmack*, —— La. ——, 272 So.2d 326, 329-30, cert. filed 42 U.S.L.W. 3006 (April 10, 1973), U.S. App. Pndg.[17]

17. In addition, Louisiana safeguards the rights of the vendee with other requirements not found in Pennsylvania:

"the Pennsylvania law does not require that there *ever* be opportunity for a hearing on the merits of the conflicting claims to possession of the replevied property";

"The party seeking the writ is not obliged to initiate a court action for repossession"; and

"he (the party seeking replevin) need not even formally allege that he is lawfully entitled to the property * * *". 407 U.S. at 77, 78.

Louisiana requires an action to be commenced, a hearing on the merits, and that the party allege he is entitled to the movable property, as well as the requirements discussed in the text, *infra*. La. Code Civ. Proc. Ann. art. 3501, 3510, and 3571 (West 1961).

Likewise the three-judge federal court in *Ross* v. *Brown Title Co.*, 356 F.Supp. 595, 598 (E.D. La.), *aff'd.* —— U.S. ——, 93 S.Ct. 2388 (1973), noted the judicial supervision required prior to summary seizure pursuant to Louisiana's *ex parte* executory process, and this Court affirmed.

Before a writ of sequestration may be issued, the petition, affidavit, and bond must be submitted for review to a judge of the local court.[18] Article 3501 delineates the prerequisites for the issuance of the writ of sequestration:

> "A writ of attachment or of sequestration shall issue *only* when the *nature of the claim* and the *amount thereof*, if any, and the *grounds relied upon* for the issuance of the writ *clearly appear* from *specific facts shown by the petition verified* by, *or by the separate affidavit* of, the petitioner, his counsel or agent." La. Code Civ. Proc. Ann. art. 3501 (West 1961) (emphasis added).

Only after the Court has reviewed the papers and made an independent determination that the requirements for the issuance of the writ of sequestration have been met is the writ of sequestration issued.

> "Strict application of the rules established for the issuance of conservatory writs has been uniformly required by the Courts in the past. It is implicit in those remedies that they should not be availed of unless the

18. Petitioner's argument to the effect that the issuance of the writ may be performed by a mere clerk outside Orleans Parish (Br. pp. 19, 43), simply ignores the recent case law to the contrary. *Wright* v. *Hughes*, 254 So. 2d 293, 297 (La. App. 1971), on an appeal from Jefferson Parish, holds that a writ of sequestration may not be issued unless specific facts are alleged in the verified petition *"in order that the issuing judge can properly evaluate the grounds."* *See also, Buckner* v. *Carmack, supra* (executory process must be issued by judge).

conditions which permit them exist." *Hancock Bank* v. *Alexander*, 256 La. 643, 237 So.2d 669, 672 (1970).[19]

Accord: *Mathe* v. *Mathe*, 177 La. 579, 148 So. 884 (1933). *See generally*, Johnson, *Attachment and Sequestration: Provisional Remedies Under the Louisiana Code of Civil Procedure*, 38 TUL. L. REV. 1 (1963). This is not a case in which state action against property in the hands of another results solely from a creditor's "own belief in his rights." *Fuentes* v. *Shevin*, 407 U.S. 67, 83 (1972).

Unless specific facts meeting the grounds for issuance of the writ are clearly set forth in the verified petition, the judge may not issue the writ. *Wright* v. *Hughes*, 254 So.2d 293, 296-97 (La. App. 1971); *Hancock Bank* v. *Alexander*, 256 La. 643, 237 So.2d 669 (1970). "The Louisiana Supreme Court holds that the allowance or disallowance of sequestration is a matter of judicial discretion." *J. C. Trahan Drilling Contractor, Inc.* v. *Sterling*, 335 F.2d 65, 66 (5th Cir. 1964). *Accord*, *State ex rel. Knighton* v. *Derrybery*, 188 La. 412, 177 So. 256, 257 (1937); *Bogalusa Ice Co.* v. *Moffett*, 188 La. 598, 177 So. 679, 681 (1937); *Succession of Pavelka*, 157 La. 480, 102 So. 579, 580 (1924); *Barrow* v. *Duplantis*, 147 La. 461, 85 So. 205, 206 (1920); *Dickinson* v. *Texana Oil Company*, 144 La. 489, 80 So. 669 (1919).

The issuing judge must be presented with specific facts "in the verified petition in order that (he) can properly evaluate the grounds" for the writ. *Wright* v. *Hughes*, *supra*, at 297. If specific facts demonstrating adequate

19. If the requirements for issuance of the writ are not met, no subsequent amendment will render valid the writ improvidently granted, although the Louisiana Code Article 1154 adopts a modern approach permitting liberal amendments of pleadings. La. Code Civ. Proc. Ann. art 1154 (West 1960); *Hancock Bank, supra.*

grounds for the issuance are not set forth, it is reversible error for the Court to issue the writ. *Wright* v. *Hughes, supra.*

These cases abundantly demonstrate that it is incumbent upon the issuing judge to weigh the probable merits for the issuance of the writ. Petitioner's sole authority for the contrary proposition (Br. p. 18), is dictum in *Zion Mercantile Co.* v. *Pierce,* 163 La. 477, 112 So. 371 (1927). Prior and subsequent authority to the contrary demonstrate the trial court's considerable powers to supervise the issuance of the writ and otherwise protect a vendee.[20]

The third relevant interest, that of the vendor in Louisiana, warrants the particular attention of this Court. In Louisiana the vendee has an unusual power over goods as to which there is vendor's privilege. Under the law of Louisiana the vendee has the right to deprive the vendor without notice and without hearing of his rights to the goods by transferring the goods to third parties.

A review of the nature of the vendor's privilege may be of some assistance to this Court. As in the case of the writ of sequestration, the vendor's privilege is unknown to common law. Margolin, *Vendor's Privilege,* 4

20. Of course use of the writ of sequestration is hardly limited to low income consumer actions: *Queen City Broadcasting* v. *Wagenwest, Inc.,* 264 So.2d 336 (La. App. 1972) (corporation's radio broadcasting fixtures and equipment were sequestered); *Tucker & Schonekas* v. *Al Dohmann Chevrolet, Inc.,* 260 So.2d 99 (La. App.), *writ refused,* 261 La. 1048, 262 So.2d 37 (1972) (sequestration to secure attorney's fees against a car leasing corporation); *Talley* v. *Bradley,* 177 So.2d 624 (La. App. 1965) (trucks, bulldozers, scraping units, welding machines, and tool houses sequestered); *Hancock Bank* v. *Alexander,* 256 La. 643, 237 So.2d 669 (1970) (Cadillac automobile).

TUL. L. REV. 239 (1930). Unlike common law jurisdictions, the conditional sale does not exist in Louisiana law. DAGGETT, LOUISIANA PRIVILEGES AND CHATTEL MORTGAGE, 90-96 (1942). Title to goods sold passes to and from a vendor to a vendee immediately upon the taking of possession of goods by the vendee.

The vendor's privilege arises by statute pursuant to the provisions of Article 3227. La. Civ. Code Ann. art. 3227 (West 1960). The vendor's privilege is a distinct right of security in movable property for the unpaid balance of the thing sold. This privilege is a distinct property right. YIANNOPOULOS, LOUISIANA CIVIL LAW TREATISE ON PROPERTY §§56, 106 (1967). As an accessorial thing, the vendor's privilege comes into existence between the parties (vendor and vendee) immediately upon transfer of movable property pursuant to a sale where not all of the purchase price is paid. *Id.* There is no need of recordation of a vendor's privilege on movables. *Id.* The privilege is created at the time of sale. *Id.*

The Federal Judiciary has previously recognized that the vendor's privilege under Louisiana law is one that is vital to the economy of that State:

> "The vendor's privilege, a special privilege on movables, is one of the most important and highest ranking security devices recognized in Louisiana. It has formed a cornerstone for credit in the economic structure of the mercantile trade in this State for centuries. It is not a spurious legal device to permit a debtor in failing circumstances to favor one creditor at the expense of another. Justice requires its recognition:

> 'As long as the price is not paid the sale augments the patrimony of the buyer at the expense of the vendor; the latter has impoverished himself, he has alienated his property and has not yet received anything in exchange. The vendor has thus gratuitously augmented the common pledge of the creditors of the buyer; the latter can be paid with the property sold without the vendor being paid, they enrich themselves at his expense, which is unjust. The new property therefore can be veritably acquired by the buyer only by the payment of the price; in French legislation which admits the immediate transfer of the title, the privilege is necessary to prevent an inequity.' Planiol, supra, No. 2608, p. 453. See, Carlin v. Gordy, 32 La.Ann. 1285 (1880)." *In re Trahan,* 283 F.Supp. 620, 627-8 (E.D. La.), *aff'd* 402 F.2d 796 (5th Cir. 1968), *cert. denied,* 394 U.S. 930 (1969).[21]

The vendor's privilege is of a fragile nature because of the vendee's ability to destroy it.[22] The vendor's privilege

21. See generally, DAGGETT, LOUISIANA PRIVILEGES AND CHATTEL MORTGAGE, 92-94 (1942). The importance of such a legislative policy favoring creditors who have added value to the property or estate of a debtor has been discussed with approval. Clark and Landers, *Snaidach, Fuentes, and Beyond: The Creditor Meets the Constitution.* 59 VA. L. REV. 355, 389 (1973). It is this precise legislative policy which has led the Louisiana legislature to have established the vendor's privilege (see App. 27).

22. Vendor's privileges on movables, as well as unrecorded privileges on immovables, are lost when the things sold are no longer in the physical possession of the purchaser. See La. Civ. Code Ann. art. 3227; *In re Trahan,* 283 F.Supp. 620 (E.D. La.), aff'd. 402 F.2d 796 (5th Cir. 1968), cert. denied 394 U.S. 930 (1969); *D. H. Holmes Co.* v. *Morris,* 188 La. 431, 177 So. 417 (1937); *Wilson* v. *Lowrie,* 156 La. 1062, 101 So. 549 (1924); *Dreyfous* v. *Cade,* 138 La. 297, 70 So. 231 (1915).

The vendor's privilege on a movable is also lost when the thing is resold by the purchaser in confusion with a mass of similar things.

[*footnote continued on next page*]

is extinguished upon sale or transfer of the movable by the vendee and consequently the vendor's right to recover the property is lost. DAGGETT, LOUISIANA PRIVILEGES AND CHATTEL MORTGAGE 119-124 (1942). Because the privilege is of such a precarious nature, the Supreme Court of Louisiana appeared quite concerned with the impact on the vendor's rights if notice to vendee prior to seizure were to be required (see App. 28-30). This is not merely an ordinary case, as petitioner suggests, involving only a creditor's interest in collecting his judgment (Br. pp. 44-45). Rather this case does present the Court with an extraordinary creditor interest. The unique features of the Louisiana privilege demand prompt action. This case presents the factual situation where it is alleged, in effect, that there is immediate danger that the debtor will destroy or conceal disputed goods (App. 29). In essence, if notice is to be given to the vendee prior to seizure, it is altogether too easy for the vendee to destroy the vendor's legal rights in the goods. The vendee's mere act of transferring the property from his physical possession would extinguish the privilege. YIANNOPOULOS, *supra* §108.

The vendor has several interests which must be considered. As noted in the dissent in *Fuentes,* 407 U.S. at 102, the vendor has an interest in preventing further abuse and deterioration of the property in which he has a substantial interest. The interests of the state and the vendor, though different, coincide in that each is interested in the

---

See La. Civ. Code Ann. art. 3228; *Forrey* v. *Strange,* 158 La. 941, 105 So. 21 (1925); *Adams Mach. Co.* v. *Newman,* 107 La. 702, 32 So. 38 (1902).

The vendor's privilege on a movable is also lost if the thing sold has become "immovable by nature." *American Creosote Co.* v. *Springer,* 257 La. 116, 241 So.2d 510 (1970).

prompt resolution of the dispute. The courts should not be overburdened with duplicative, multiple proceedings concerning the same dispute. The only party whose interest is potentially adverse to the speedy resolution of the merits, is the debtor. Indeed in this particular instance, Mitchell has not availed himself of his opportunity to raise defenses going to the merits of the claim, nor did he avail himself of the opportunity to have the use of the goods restored to him and removed from the court's custody.

The Supreme Court has consistently held that the requirements of due process cannot be assessed by an automatic standard. In a concurring opinion in *Anti-Fascist Committee* v. *McGrath*, 341 U.S. 123, 162, 163 (1951), Justice Frankfurter discussed due process as follows:

> "* * * 'due process,' unlike some legal rules is not a technical conception with a fixed content unrelated to time, place and circumstances. * * * [It] cannot be imprisoned within the treacherous limits of any formula.
>
> * * *
>
> The Court has responded to the infinite variety and perplexity of the tasks of government by recognizing that what is unfair in one situation may be fair in another. * * * Whether the *ex parte* procedure to which the petitioners were subjected duly observed 'the rudiments of fair play,' *Chicago, M. & St. P.R. Co.* v. *Polt*, 232 U.S. 165, 168, cannot, therefore, be tested by mere generalities or sentiments abstractly appealing. The precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed, the protection implicit in the office of the functionary whose conduct is chal-

lenged, the balance of hurt complained of and good accomplished—these are some of the considerations that must enter into the judicial judgment."

Given the unique power on the part of a vendee, it was appropriate for the Supreme Court of the State of Louisiana in this case to engage in a balancing of the respective interests of the State, the vendor, and the vendee and to conclude that the Fourteenth Amendment should not deprive the vendor of the right to take prompt judicially supervised *ex parte* action against the goods.

The Louisiana Supreme Court took note of an exception announced in *Fuentes* that there "may be cases in which a creditor could make a showing of immediate danger that a debtor will destroy or conceal disputed goods," 407 U.S. at 93, and properly held on the facts, this was such a case (App. 29). In arguing that the Louisiana law governing the issuance of the writ of sequestration does not explicitly require allegations of fear that the goods will be wasted (Br. pp. 41-43), petitioner completely misreads the decision of the Louisiana Supreme Court. In the petition for the writ the respondent has asserted their fear that petitioner would "alienate or otherwise dispose of" the merchandise (App. 3-4).[23] Attention to the motion to dissolve the writ shows that allegation has not been challenged or contradicted (App. 13-14). It was legitimately open to the Supreme Court of Louisiana to conclude

23. Petitioner does not address himself to the question of whether in light of *Fuentes*, the Louisiana court has implicitly held that such allegations are now required prior to the issuance of a writ of sequestration. *Cf. Buckner* v. *Carmack*, —— La. ——, 272 So.2d 326, 330 (1973), cert. filed 42 U.S.L.W. 3001 (1973), U.S. Appeal Pndg. (executory process).

in the light of the precarious nature of the vendor's privilege that the uncontradicted showing presented the very case in which prompt action was needed.

The Louisiana Supreme Court could properly find that in view of the rights which a vendee has with respect to movable property where there is a vendor's privilege, under the law of Louisiana there is a special need for permitting a vendor use of sequestration without notice and on a prompt basis. This should particularly be true where there could have been no doubt in the petitioner's mind that he was in default and that the failure to pay would result in having the goods seized by the vendor. As another court has recently stated, buyers are aware that "[i]f you don't pay, they take it away." *Almor Furniture & Appliances Inc.* v. *MacMillan,* 116 N.J. Super. 65, 66, 280 A.2d 862, 864 (1971). This was undoubtedly what the Supreme Court of Louisiana was referring to when it indicated that vendees unquestionably recognize that their right to possession of property is limited and that sequestration may be anticipated after default in payment for the goods (App. 29). Indeed, one recent study regarding repossession has shown that the debtors in default have had more than 25 contacts from the creditor prior to the seizure. Hale, *The Direction of Litigation in the Consumer Credit Field,* 28 Bus. Law. 639, 651-52 (1973).[24] Where there has been continued non-payment by the vendee, and where there have been repeated efforts to persuade the vendee to meet his just obligations, given the power that he has to

24. At least one court in refusing to apply the *Fuentes* rule to a claimed deprivation has held that a debtor in default has ample remedies available to him in the way of injunctive relief so as not to require a prior hearing. *Lucas* v. *Wisconsin Electric Power Co.,* 466 F.2d 638 (7th Cir. 1972) (utility cutoff).

deprive the vendor of his rights with regard to the goods, the right of sequestration now accorded the vendor under the laws of Louisiana should be permitted to continue.

Another unique Louisiana Civil law procedure with no genuine common law counterpart, executory process,[25] has been reviewed by this Court and has been upheld. In the case of *Fleitas* v. *Richardson*, 147 U.S. 538 (1893), the Court considered executory process issued on an *ex parte* basis and found nothing constitutionally defective with this procedure. *Accord, Levy* v. *Fitzpatrick*, 40 U.S. 167 (1841).

More significantly, this Court in the past term had occasion to reconsider the propriety of Louisiana executory process. The Court affirmed the district court decision holding that Louisiana executory process, which differs in no material respect from sequestration, fully complied with the requirements of the Fourteenth Amendment. *Ross* v. *Brown Title Co.*, 356 F.Supp. 595 (E.D. La.), *aff'd.* —— U.S. ——, 93 S.Ct. 2388 (1973). In *Ross* the sheriff's seizure resulted in a significant deprivation of property, *i.e.*, the alteration and significant diminution in the value of the real property owned. The Louisiana statute governing executory process, as does sequestration, extends to movable goods and to the vendor's privilege. La. Code Civ. Proc. Ann. art. 2631 (West 1960); McMahon, *The Historical Development of Executory Procedure in Louisiana*, 32 TUL. L. REV. 555 (1958). The only additional element not found in sequestration but required with executory procedure is a mere demand for payment by the clerk of the

25. *Buckner* v. *Carmack*, —— La. ——, 272 So.2d 326 (1973); McMahon, *The Historical Development of Executory Procedure in Louisiana*, 32 TUL. L. REV. 551 (1958).

court, though certain plaintiffs in *Ross* were not given such notice. La. Code Civ. Proc. Ann. art. 2639 (West 1960). The statute permits actual seizure by the sheriff of movable and much immovable property three days after a demand for payment, La. Code Civ. Proc. Ann. art. 2721 (West 1960), and a notice of seizure of the property is filed with the recorder of mortgages without prior notice to the debtor. *Buckner* v. *Carmack*, —— La. ——, 272 So.2d 326 (1973).[26] In the instant case, as in *Ross*, before respondent could take any action against petitioner's goods, respondent was required to submit an application to the scrutiny of a local trial court before the writ of sequestration could be issued (see pp. 39-41, *supra*). Since the sequestration statute here challenged accords a vendee the same safeguards as the Louisiana procedure so recently reviewed and upheld by this Court in *Ross*, it likewise should be upheld.

Petitioner seeks to upset the use in this case of the unique Louisiana writ of sequestration on arguments that represent "no more than ideological tinkering with state law." *Fuentes* v. *Shevin*, 407 U.S. 67, 102 (1972) (White, J. dissenting).

The law of Louisiana is *sui generis*. The Louisiana Supreme Court has recognized the need for a special rule regarding the vendor's privilege in that State. The Supreme Court of the State of Louisiana properly took into

26. As to a subsequent determination regarding the parties' rights to sell or dispose of the property, sequestration provides for notice and subsequent hearing on the merits of the claim, but with executory process such a hearing occurs only at the instance of the debtor. La. Code Civ. Proc. Ann. art. 3510, 2751 *et seq.* (West 1961).

account the respective interests of vendor and vendee in its balancing of the rights of the parties regarding the protection afforded under the United States Constitution, and its decision should not lightly be overturned.

Conclusion

For the reasons set forth above, this Court should vacate the writ of certiorari as having been improvidently granted, or in the alternative, should affirm the decision of the Supreme Court of Louisiana.

Respectfully submitted,

THOMAS J. O'SULLIVAN
14 Wall Street
New York, New York 10005

MARSHALL J. FAVRET
527 Hibernia Bank Building
New Orleans, Louisiana 70112

Attorneys for Respondent

Of Counsel:
ANTHONY A. SANTA BARBARA
WHITE & CASE

FAVRET AND FAVRET

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 72-6160

LAWRENCE MITCHELL,

Petitioner,

v.

W.T. GRANT COMPANY,

Respondent.

PETITIONER'S REPLY BRIEF

ROBERT J. HOBBS
National Consumer Law Center, Inc.
One Court Street
Boston, Massachusetts 02108
Tel: (617) 523-8010

OKLA JONES, II
2643 Desire Street
New Orleans, Louisiana 70117
Tel: (504) 522-0617

JOHN W. REED
2735 Tulane Avenue
New Orleans, Louisiana 70119
Tel: (504) 822-4489

Attorneys for Petitioner

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

TABLE OF CONTENTS

Page

ARGUMENT IN REPLY:

I. The Unconstitutionality of the Statutes Permitting W.T. Grant Company's Procurement of the Seizure of Lawrence Mitchell's Refrigerator, Stove, Washer and Phonograph Without Prior Notice or Opportunity for a Hearing Presents a Justiciable Controversy Ripe for Determination 1

II. The Louisiana Official Issuing an Ex Parte Writ of Sequestration Lacks the Necessary Authority To Make an Independent Inquiry Into the Merits of the Applicant's Underlying Claim 6

III. The Record Does Not Support Grant's Argument That Some Type of Notice Was Served Upon Lawrence Mitchell Prior to the Seizure of Mitchell's Goods 10

CONCLUSION 13

TABLE OF AUTHORITIES

Cases:

Barrow v. Duplantis, 147 La. 461, 85 So. 205 (1920) 8

Bogalusa Ice Co. v. Moffett, 188 La. 598, 177 So. 679 (1937) 8

Buckner v. Carmack, ___ La. ___, 272 So.2d 326, *appeal filed*, 42 U.S.L.W. 3006 (April 10, 1973) 7

Dickinson v. Texana Oil and Refining Company, 144 La. 489, 80 So. 669 (1919) 8, 9

Jefferson v. Jefferson, 246 La. 1, 163 So.2d 74 (1964) 11

Mathe v. Mathe, 177 La. 579, 149 So. 884 (1933) 9

Page

Ross v. Brown Title Corp., 356 F. Supp. 595 (E.D. La.), *aff'd.* 412 U.S. 934, 93 S.Ct. 2788 (1973) 7

State ex rel. Knighton v. Derryberry, 188 La. 598, 177 So. 256 (1937) 8

Succession of Pavelka, 157 La. 480, 102 So. 579 (1924) 8

J.C. Trahan Drilling Contractor, Inc. v. Sterling, 355 F.2d 65 (5th Cir. 1964) 8

Tucker and Shonekas v. Al Dohmann Chevrolet, Inc., 260 So.2d 99 (La. App.), *writ refused,* 261 La. 1048, 262 So.2d 37 (1972) 4

W.T. Grant Company v. Mitchell, 263 La. 627, 269 So.2d 186 3-4

Zion Mercantile Co. v. Pierce, 163 La. 477, 112 So. 37 (1927) 9

State Statutes:

Louisiana Code of Civil Procedure

Articles 851-2201 3
Article 1292 11
Articles 2631, *et seq.* 7
Article 3461 3
Article 3462 3
Article 3501 8
Article 3504 13
Article 3506 5
Article 3571 8
Article 3573 8-9

Louisiana Revised Statute 13:3471(5) 12

Other Authorities:

Comment (c) to Louisiana Code of Civil Procedure, Article 3506 10

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 72-6160

LAWRENCE MITCHELL, *Petitioner,*

v.

W.T. GRANT COMPANY, *Respondent.*

PETITIONER'S REPLY BRIEF

ARGUMENT IN REPLY

I.

THE UNCONSTITUTIONALITY OF THE STATUTES PERMITTING W.T. GRANT COMPANY'S PROCUREMENT OF THE SEIZURE OF LAWRENCE MITCHELL'S REFRIGERATOR, STOVE, WASHER AND PHONOGRAPH WITHOUT PRIOR NOTICE OR OPPORTUNITY FOR A HEARING PRESENTS A JUSTICIABLE CONTROVERSY RIPE FOR DETERMINATION.

Proceeding from a number of premises, W.T. Grant Company (hereinafter, "Grant") asserts in its brief that the issues between the parties were irrevocably resolved below and concludes that the controversy between Petitioner and Respondent has become moot. Respondent's brief, pp. 19-27. Petitioner Lawrence Mitchell (hereinafter, "Mitchell") disputes those premises and the conclusion. Mitchell maintains his position that he has

been deprived of property without prior notice and hearing and seeks review of the decisions below that held such a deprivation to not violate the requirements of due process.

The premises upon which Grant's assertion of mootness depends are that: (1) prior notice and hearing will not benefit Mitchell; (2) there has been a final determination of the ultimate right of possession of the goods seized; and (3) Mitchell somehow abandoned or waived in the proceedings below all of the defenses or counterclaims which he might have otherwise had.

First, it should be made clear that Mitchell is not now asking this court for prior notice and hearing. Mitchell cannot be given prior notice and hearing. He has already been deprived of his property without notice and hearing. Instead, what Mitchell seeks is the release of his household goods because statutes which provide for the seizure of those goods without prior notice and hearing are violative of due process. The responsibility for providing prior notice and hearing for sequestration procedure in the future is lodged in the Louisiana Legislature. It is not certain that the Louisiana Legislature would do so, because, among other reasons, there are many other prejudgment, dispossessory remedies available to Louisiana creditors. *See*, Petitioner's brief, pp. 33-34. Mitchell will in fact benefit from a favorable decision in this Court for he will as a consequence be allowed to enjoy the use of his property while preparing his defense to the merits, unless Grant could meet the stricter criteria of one of the other Louisiana, prejudgment dispossessory remedies.

Grant's second premise, that there has been a final determination of the ultimate right to possession of the goods seized, cannot be supported by either the applic-

able Louisiana law or by the record in this case. Such a premise fails to perceive the relationship between the merits of the case and the sequestration procedure. To obtain a seizure by sequestration, the plaintiff must have filed, or receive permission to file at a later date, a petition containing a claim against the defendant. La. Code Civ. Pro., Arts. 3461, 3462. The seizure by sequestration is a mere adjunct to the claim filed by the plaintiff. The theoretical purpose of the sequestration procedure is to place disputed goods and collateral in the custody of the court pending a determination of the claim, or as stated by Grant:

> The traditional notion of sequestration does not involve taking property from one person and giving it to another, but rather the property is taken into legal custody to conserve it during the pendency of a dispute.... By way of contrast the 'ancient possessory action' of replevin is a method by which a determination of the right to possession may be immediately made ... Respondent's brief, pp. 28-29 (citations omitted).

The record does not support the assertion that there has been a final determination of the ultimate right to possession. Mitchell, when faced with the seizure by sequestration and the claim of the petition, could have defended against either or both. Mitchell chose to attack the seizure first, and the claim of the petition is still pending, subject to discovery, exceptions, answer, reconventional demand, third party demand, trial, and appellate review. La. Code Civ. Pro., Arts. 851-2201. The decisions of the courts below determine that Mitchell will be dispossessed of his property until a determination of the merit of Grant's claim, but do not reach the merits of that claim. *W.T. Grant Company v. Mitchell,* 263 La.

627, 643, 269 So.2d 186, 1192 (1972) (A. 31). A suggestion that the merits of the lawsuit might nevertheless be determined at a hearing on the Motion To Dissolve The Sequestration is contrary to the single Louisiana precedent on that point. *See Tucker and Shonekas v. Al Dohmann Chevrolet, Inc.*, 260 So.2d 99 (La. App.), *writ refused*, 261 La. 1048, 262 So.2d 37 (1972). (Entry of a final judgment on the merits after hearing only the motion to dissolve the sequestration was reversible error requiring remand.) If Grant's assertion that there has been a determination of the ultimate right to possession were correct, the pending trial on the merits would be nothing but an exercise in futility.

Grant asserts as its third premise that this case is moot because Mitchell somehow during the course of the proceedings below abandoned or waived all of the defenses or counterclaims which he might have had. Grant cites a number of cases which support the proposition that *some* defenses are relevant and *may* be raised at the hearing on the motion to dissolve the sequestration. Respondent's brief, pp. 22-25. However, neither those cases nor any other Louisiana authority support the proposition that any defenses not raised at the hearing on the motion to dissolve are waived or abandoned. Mitchell intends to assert his defenses by way of an answer or other appropriate pleading. However, Mitchell first seeks to remove the pressure of the patently unconstitutional seizure from his efforts to prepare his defense.

Finally, Grant construes the stipulation of the parties in the trial court to constitute a waiver or abandonment of all of Mitchell's possible defenses. Respondent's brief, pp. 25-26. The full stipulation was: "It is stipulated that the vendors lien did exist on the items." A. 16. The

stipulation was entered into the record by Grant's trial attorney. A. 16. Mitchell's attorney understood the purpose of the stipulation to be evidentiary. The stipulation was to accommodate Grant by making it unnecessary for an employee of Grant to take the witness stand in order to give the testimony necessary to establish the factual requisites for a vendor's privilege, i.e. there had been a credit sale of goods and a balance remained to be paid on the goods. The law clearly placed the burden upon Grant to prove "the grounds upon which the writ was issued." La. Code Civ. Pro., Art. 3506; *see also*, Petitioner's brief, p. 17, n. 17. The first time that some other construction was placed upon that stipulation was in Grant's brief in this Court.

However, the stipulation of the parties simply does not support Grant's present construction of the stipulation. That stipulation, as vague as it is, says nothing about the amount of money that might be due to Grant from Mitchell, about the propriety of the acceleration of the balance of the payments, or about defenses or counterclaims. To read a determination of those legal and factual issues into that stipulation would ignore the very limited purpose for which Grant's counsel introduced it. That stipulation was introduced to show the statutory grounds on which Grant justified the sequestration. The stipulation is not the most artfully worded even for that purpose, e.g. it is phrased in the past tense without identifying the point in time in the past to which it refers, and it does not identify the holder of the "lien" or items to which the "lien" had once attached. In no event could that stipulation be so broadly construed as urged by Grant as to become a confession of judgment or waiver of defenses by Mitchell. That construction ignores the substance, the purpose, and the fair import of that stipulation.

II.

THE LOUISIANA OFFICIAL ISSUING AN EX PARTE WRIT OF SEQUESTRATION LACKS THE NECESSARY AUTHORITY TO MAKE AN INDEPENDENT INQUIRY INTO THE MERITS OF THE APPLICANT'S UNDERLYING CLAIM.

Grant asserts that the Louisiana sequestration procedure satisfies the requirements of due process, not because the procedure provides prior notice and hearing, but because the official authorizing the ex parte sequestration exercises some discretion in doing so. The assertion is wrong as a matter of both constitutional and Louisiana law. Mitchell has already briefed his constitutional position. As a matter of constitutional law, a statute which provides for a deprivation of property without prior notice and hearing violates due process unless the statute is confined to the "extraordinary situations" clearly and specifically delineated by this Court in prior decisions. The Louisiana statutes providing for sequestration are not narrowly confined to "extraordinary situations." Petitioner's brief, pp. 9-39.

As a matter of Louisiana law, the official authorizing a writ of sequestration lacks the authority to inquire into either the validity of the sequestering party's underlying claim or into the presence of an "extraordinary situation" which might otherwise allow dispensing with prior notice and hearing. The official lacks that authority because neither of those inquiries are considered relevant to the issuance of a writ of sequestration under the Louisiana law. Petitioner's brief, pp. 14-27, 30-45. The function of the judge or clerk who issues a writ of sequestration is a ministerial function. Petitioner's brief, pp. 18-19.

In conjunction with its argument on this point, Grant cites a number of cases construing Louisiana law. Respondent's brief, pp. 37-38, 40. Those cases are apparently cited for the proposition that an official is invested with broad discretion in issuing a writ of sequestration. Those cases lead Grant to the conclusion that the "vendee's interest is more than adequately protected by a disinterested judge who must carefully review the adequacy of the assertions presented in the petition seeking the writ of sequestration," that " 'the allowance or disallowance of sequestration is a matter of judicial discretion,' " and "that it is incumbant upon the issuing judge to weigh the probable merits for the issuance of the writ." Respondent's brief, pp. 37, 40, and 41. However, the cases which are cited by Grant to reach that conclusion do not involve the same type of seizure procedure as was employed in this case and are inapplicable to this case.

For example, on pages 37-39 of Respondent's brief, the Respondent cites two cases dealing with "executory process," a Louisiana foreclosure procedure premised upon a confession of judgment contained in a mortgage in authentic form. The two executory process cases cited by the Respondent were *Ross v. Brown Title Co.*, 356 F. Supp. 595 (E.D. La.), *aff'd.* 421 U.S. 934, 193 S.Ct. 2388 (1973); *Buckner v. Carmack*, ___ La. ___, 272 So.2d 326, *cert. filed*, 42 U.S.L.W. 3006 (April 10, 1973). Executory process is a procedure authorized by a set of statutes and rules completely different and distinct from sequestration. La. Code Civ. Pro., Arts. 2631, *et seq.* What is, or is not, done in an executory proceedings sheds no light on sequestration proceedings. It is like comparing apples and oranges: although they are both fruit, they have totally different flavors and compositions.

Another Louisiana repossessory device with which Respondent confuses the sequestration procedure employed in this case is the similarly named, but distinct procedure of "judicial sequestration," sometimes referred to as "*ex officio* sequestration." Of the cases cited on page 40 of Respondent's brief, *J.C. Trahan Drilling Contractor, Inc. v. Sterling*, 355 F.2d 65 (5th Cir. 1964); *State ex rel. Knighton v. Derryberry*, 188 La. 598, 177 So. 256 (1937); *Bogalusa Ice Co. v. Moffett*, 188 La. 598, 177 So. 679 (1937); *Succession of Pavelka*, 157 La. 480, 102 So. 579 (1924); *Barrow v. Duplantis*, 147 La. 461, 85 So. 205 (1920); and *Dickinson v. Texana Oil Company*, 144 La. 489, 89 So. 669 (1919), all involved "judicial" sequestration.

The sequestration procedure employed in the instant case is provided by Louisiana Code of Civil Procedures, Articles 3501, 3571 and related provisions. On the other hand, the procedure of "judicial sequestration" as discussed in the cases cited by Respondent embodied the unique, broad powers conferred upon judges by Louisiana Code of Civil Procedure, Article 3573.

One of the many distinctions between the two procedures is the very broad discretion allowed a judge to issue or refuse to order a "judicial sequestration." This is in sharp contrast to the "ministerial" nature of the act of authorization of the type of sequestration employed by Grant in the instant case. *See* Petitioner's brief, pp. 16-19. Thus, in the cases cited by Grant on page 40 of its brief for the proposition that allowance or disallowance of "sequestration" is "a matter of judicial discretion" the cases involved not the procedure employed in this case, but "judicial sequestration" a seizure device which issues "by the court on its own motion" and "without requiring security." *See* La. Code Civ. Pro.,

Art. 3573. Thus, in the "judicial sequestration" cases, the appellate courts tend to defer to the trial judge's discretion. In contrast, in the only reported decisions in which a plaintiff sought appellate review of a trial judge's refusal to issue the type of sequestration employed in this case, a writ of mandamus was granted to compel the trial judge to issue the writ of sequestration. *Zion Mercantile Co. v. Pierce*, 163 La. 477, 480, 112 So. 371 (1927); *see also, Mathe v. Mathe*, 177 La. 579, 149 So. 884 (1933) (Mandamus issued to compel sequestration as to some property but not as to other property in dispute). The Louisiana Supreme Court held in the *Pierce* case that it was the trial judge's "mandatory duty" to issue a writ of sequestration when presented with an affidavit and bond in the proper form.

Another distinction between "judicial sequestration" and the type of sequestration procedure employed in this case is that a judge may require notice and hearing prior to a "judicial sequestration." *See e.g., Dickinson v. Texana Oil and Refining Co.*, 144 La. 489, 80 So. 669 (1919) (Show cause hearing held prior to an unbonded, "judicial sequestration.")

The significance of the failure of Grant to distinguish between the sequestration procedure at issue in this case and other Louisiana repossessory procedures is that it leads Grant to the erroneous conclusion "that it is incumbant upon the issuing judge to weigh the probable merits for the issuance of the writ of sequestration." Respondent's brief, p. 41. This suggests that a judicial investigative inquiry into the validity of the plaintiff's claim takes place prior to the issuance of sequestration and that this unique judicial investigation may be substituted for the due process requirement of a prior adversial hearing in which the defendant may participate

after notice. Not only is there a lack of constitutional and Louisiana authority for this assertion, but there is also a complete absence of any hint in the record of the instant case that such a unique judicial investigation took place. The trial judge's order authorizing the sequestration does not hint that a judicial investigation took place; that order allows the writ "as prayed for." A. 5. The trial judge's post-seizure order refusing to dissolve the sequestration does not hint that a judicial investigation took place; that order was premised upon "the pleadings," "the joint stipulation of counsel," and "the oral argument." A. 17. The trial judge did not conduct an independent investigation into the validity of the plaintiff's claim simply because the sequestration procedure contemplates that the validity of the plaintiff's underlying claim is not relevant to the issuance of the writ. The validity of the plaintiff's underlying claim is to be tested by pleadings and the plenary trial on the merits of the lawsuit filed in conjunction with the sequestration. Comment (c) to La. Code Civ. Pro., Art. 3506, states the rule: "This article retains the jurisprudential rule that only the ground for the auxiliary remedy can be inquired into on the motion to dissolve, and not the merits of the main demand."

III.

THE RECORD DOES NOT SUPPORT GRANT'S ARGUMENT THAT SOME TYPE OF NOTICE WAS SERVED UPON LAWRENCE MITCHELL PRIOR TO THE SEIZURE OF MITCHELL'S GOODS.

Grant has raised the argument that the record upon which the Louisiana Supreme Court premised its holding of constitutionality of sequestration is insufficient for this Court to determine that same question. Respondent

states: ". . . there is evidence in the record tending to show that petitioner recieved notice of respondent's proceedings against him on February 7 by means of a substituted service (R. 5).[5]" Respondent's brief, p. 17. Footnote 5 of Respondent's brief then sets out a constable's "return" which does not bear any signature and which was crossed out in the record of this case. R. 5. Not only did Respondent fail to point out that this crossed-out "return," which Respondent characterizes as "evidence," was unsigned, but Respondent also failed to direct this Court's attention to the return which bears a signature, is not crossed-out, and is located immediately adjacent to the unsigned, crossed-out "return." R. 5. The signed return provides:

> Received 3 FEB 1972
> and on FEB 18 1972 19__
> I served a true copy of the within
> CITATION on LAWRENCE
> MITCHELL defendant herein
> in person.
> /s/ Earl Demoulette
> Deputy Constable

The Louisiana rule is that a return is to be deemed prima facie correct once filed and completed with the necessary data and signature. La. Code of Civ. Pro., Art. 1292; *see also, Jefferson v. Jefferson,* 246 La. 1, 13, 163 So.2d 74, 79 (1964) ("The return forms part of the record and must be considered correct for purposes of this review.") It is also the Louisiana rule that the presumption of correctness of a return may be overcome

only by direct attack by motion or petition to nullify. La. Rev. Stat. 13:3471(5).[1]

Grant also attacks the manner in which Mitchell has attempted to call to this Court's attention an error in the dating of the seizure. Mitchell had asserted in the Louisiana courts and in his petition for certiorari to this Court that the seizure had taken place on February 7, 1972. Grant specifically admitted in the Louisiana appellate courts that this was the date on which the seizure took place. The Louisiana Supreme Court found that the seizure took place on February 7, 1972. However, it became evident to both parties during the preparation of the Chronological List of Relevant Docket Entries for the Single Appendix for this Court that the date of seizure was in fact February 18, 1972, and not February 7th. The parties, therefore, listed the date of seizure as February 18, 1972, in the Single Appendix. Mitchell attached as Appendices "B" and "C" to his brief the documents which are required by Louisiana law to record the date of seizure but which had not been placed in the clerk's file by the Constable as required by La.

---

[1] La. R.S. 13:3471 *Supplementary rules of service of process.*

* * * * *

(5) The return of the serving officer on any citation or other legal process is conclusive unless directly attacked. Such an attack may be made by rule in the action or proceeding, if made prior to judgment. If made after judgment, the return may be attacked only in a direct action to annul the judgment, which may be brought in the original action or proceeding.

If the defendant was actually served, the court may correct an error in the return by an amendment there of, on a rule brought against and tried contradictorily with the defendant who was served or any other party who may be affected by the amendment.

* * * * *

Code Civil Pro., Art. 3504. The Respondent now argues that the correction muddies the record when tied to the unsigned, crossed out "return." However, the question of whether the seizure took place on February 18th or February 7th does not alter the fundamental defect of which Mitchell complains. No notice was given to him prior to either February 7th or 18th. R. 5; Petitioner's Brief, Appendices "B" and "C." He had no opportunity, neither in reality nor under the applicable statutes, to defend his property prior to seizure, whether that seizure took place on February 7th or 18th. The parties' correction of the erroneous date of seizure has not altered the legal position of either party.

CONCLUSION

For the above reasons and for the reasons stated in his principal brief, Petitioner Lawrence Mitchell respectfully requests that the decisions of the courts below be vacated and reversed and that the sequestration of his household goods be dissolved.

Respectfully submitted,

ROBERT J. HOBBS
National Consumer Law Center, Inc.
One Court Street
Boston, Massachusetts 02108
Tel: (617) 523-8010

Attorney for Petitioner

FEB 19 1974

No. 72-6160

In the Supreme Court of the United States

OCTOBER TERM, 1973

LAWRENCE MITCHELL,
Petitioner,

v.

W. T. GRANT COMPANY,
Respondent.

MOTION FOR PERMISSION TO FILE BRIEF ON MERITS AFTER ARGUMENT ON BEHALF OF THE STATE OF LOUISIANA

On Writ of Certiorari to the Supreme Court of Louisiana

WILLIAM J. GUSTE, JR.,
Attorney General,
State of Louisiana.

WARREN E. MOULEDOUX,
First Asst. Attorney General,
State of Louisiana.

LOUIS M. JONES,
Assistant Attorney General,
State of Louisiana.

7th Floor—2-3-4 Loyola Building
New Orleans, Louisiana 70112
(504) 527-8375

TABLE OF CONTENTS

	Page
Motion For Permission To File Brief	1
Certificate of Service	3
Argument:	
I. The Sale	5
II. The Louisiana Sequestration Remedy Does Not Violate Due Process By Not Providing For Judicial Notice	6
III. The Louisiana Conservatory Writ of Sequestration Provides An Opportunity For A Hearing And Is Not Violative of Due Process	8
IV. *Fuentes* and *Mitchell* Are Readily Distinguishable	9
V. *Fuentes* A Threat To Credit Sales In Louisiana	10
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Barber Asphalt Paving Co. v. St. Louis Cypress Co., 1908, 121 La. 152, 46 So.193	6
W. T. Grant Company v. Mitchell, 1972, 263 La.627, 269 So.2d 186	6, 10, 11
Ownbey v. Morgan, 256 U. S. 94,110 (1921)	8
C. A. Kaufman Co., Ltd. v. Gregory, 244 La. 766, 154 So. 2d. 392 (1963)	8, 9
Fuentes v. Shevin, 407 U. S. 67 (1972)	9

Page

Hurtado v. California, 110 U.S. 531 (1884) 10

Statutory Materials

Constitutional:

United States Constitution,
Amendment XIX, #1 8

State Statutes:

Louisiana Civil Code:
Article 1911-14 7
Article 1933 7
Article 2439 5
Article 2456 6
Article 3217 6
Article 3227 6

Louisiana Code of Civil Procedure:
Article 423 7
Article 3501 8
Article 3502 8
Article 3506 8
Article 3571 7

Other Authorities:

Daggett, "Louisiana Privileges and Chattel Mortgages, page 91 (1942) 6

Margolin, "Vendor's Privilege," 4 Tulane Law Review 237 (1929) 6

Sarpy, "The Putting In Default As a Prerequisite To Suit in Louisiana," 1 Loyola Law Review 127 (1942) 7

U. S. Law Week, 42 L. W. 3346 5

No. 72-6160

In the Supreme Court of the United States

OCTOBER TERM, 1973

LAWRENCE MITCHELL,

Petitioner,

v.

W. T. GRANT COMPANY,

Respondent.

MOTION FOR PERMISSION TO FILE BRIEF ON MERITS AFTER ARGUMENT ON BEHALF OF THE STATE OF LOUISIANA

May it Please the Court:

The Attorney General of the State of Louisiana, in accordance with Rule 42 of this Court, moves that he be permitted to file this brief on the merits after argument.

That this cause involves certain basic laws of property rights of the Civil Law State of Louisiana which are of major concern to its citizens.

Your mover respectfully requests that this brief be accepted and considered by the Court.

WILLIAM J. GUSTE, JR.,
Attorney General,
State of Louisiana.

WARREN E. MOULEDOUX,
First Asst. Attorney General,
State of Louisiana.

LOUIS M. JONES,
Assistant Attorney General,
State of Louisiana.

7th Floor—2-3-4 Loyola Building
New Orleans, Louisiana 70112
(504) 527-8375

CERTIFICATE

I hereby certify that copies of the above motion and of the accompanying brief have been duly served on counsel of record in this cause by transmitting the same to them by United States Mail in accordance with the rules of this Court, postage prepaid, at their record respective addresses.

, 1974

LOUIS M. JONES
Assistant Attorney General

No. 72-6160

In the Supreme Court of the United States

OCTOBER TERM, 1973

LAWRENCE MITCHELL,
Petitioner,

v.

W. T. GRANT COMPANY,
Respondent.

BRIEF ON THE MERITS ON BEHALF OF THE STATE OF LOUISIANA

May it Please the Court:

The undersigned attorney general of the State of Louisiana respectfully files herein a supplemental brief in order to set forth certain basic law applicable, uniquely, to the State of Louisiana. It appears that, at the time of oral argument, the court did not have the benefit of experienced Louisiana counsel.[1]

I.

THE SALE

Under the civil law of Louisiana title passes to the purchaser when there has been an agreement on the price and the thing.[2] Unlike the common law, title

[1] U. S. Law Week, 42 L. W. 3346, Cols. 3 & 4.

[2] La. Civil Code Article 2439

can not be held by the vendor until he has received full payment. A Louisiana purchaser has title and possession regardless of the fact that he may not have paid any portion of the price at the time of sale.[3]

The Louisiana vendor's privilege is "*sui generis*".[4] There is no necessity for recordation, and it exists only so long as the property remains in the possession of the purchaser. It is easily defeated by transfer. There is no requirement that the debtor notify his creditor of a proposed transfer from his possession.[5]

II.

THE LOUISIANA SEQUESTRATION REMEDY DOES NOT VIOLATE DUE PROCESS BY NOT PROVIDING FOR JUDICIAL NOTICE

Sequestration can only be used to preserve a privilege when it is within the power of the defendant to

---

[3] La. Civil Code Article 2456; *Barber Asphalt Pav. Co. v. St. Louis Cypress Co.*, 1908, 121 La. 152, 46 So. 193—"A so-called conditional sale, or sale by which the vendee is to become at once unconditionally bound for the price, and the vendor is to continue to be the owner of the property until the price is paid, is not possible under the laws of this state. A petition wherein the vendor under such a contract claims the ownership of the property sold shows no cause of action."

[4] La. Civil Code Article 3217, 3227; *W. T. Grant Co. v. Mitchell*, 1972, 263 La. 627, 269 So.2d 186 @ 189—"As understood in our law, the vendor's privilege does not exist at common law. It is distinguished from the common law vendor's lien, which the vendor loses when he delivers possession of the article sold to the vendee."

[5] Margolin, Vendor's Privilege, 4. Tulane Law Review 237 (1929); Daggett, Louisiana Privileges and Chattel Mortgages, p. 91 (1942).

conceal, dispose of, or waste the property or revenues therefrom, or remove the property from the parish, during pendency of the action.[6]

The debtor receives notice of his default from the vendor desiring to exercise his vendor's privilege. If he did not furnish notice, his suit would be subject to an exception of prematurity.[7] If the vendor fails to promptly *put his debtor in default* he can be considered to have waived his right to proceed.[8] There is actual notice, but not judicial notice. Can judicial notice be said to be any greater warning than legal notice?

About the only thing the debtor can say is that—*'he didn't know the gun was loaded'*. At the summary hearing, on his own motion, the best the debtor in this cause could do was stipulate that the vendor's lien existed on the sequestered property.[9]

---

[6] La. Code of Civil Procedure, Article 3571

[7] La. Code of Civil Procedure, Article 423

[8] Sarpy, *The Putting In Default As A Prerequisite To Suit In Louisiana, 1 Loyola Law Review 127 (1942) @ 127*— "The doctrine known as the 'putting in default' is one of the quaint precepts of the Civil Code of Louisiana which can be classed as unique in the legal institutions of the United States of America. ------"

Ibid. @ 128 "Putting in default may be appropriately described as a guardian of fair play between parties to contracts which lack conciseness as to the necessity for timely performance. The putting in default, by nature, is directly related to the field of adjective law. It is a mandate of the Civil Code of Louisiana by which a creditor must call upon the debtor to perform before drawing the debtor into litigation for redress sounding in breach."

Louisiana Civil Code, Articles 1911-14; 1933.

[9] Respondent's Brief, page 8

Judicial notice is not due process, nor does due process mean judicial notice. There is no set standard of application. A doctrine of fairness to both, in view of all considered circumstances, produces due process.[10]

III.

THE LOUISIANA CONSERVATORY WRIT OF SEQUESTRATION PROVIDES AN OPPORTUNITY FOR A HEARING AND IS NOT VIOLATIVE OF DUE PROCESS

Sequestration issues only on the order of a judge and not an administrative officer. A bond is furnished by the creditor in an amount sufficient to protect the defendant against damages and attorney's fees resulting from wrongful issue. Ordinarily the petition and verified affidavit are filed at the same time. The Judge determines that the grounds relied on for the issuance of the writ clearly appear from the pleadings before issuing his order.[11]

If the debtor has wrongfully been deprived of his property for any valid reason, he can by summary process have the writ dissolved. It is important to note that at a summary hearing the *seizing creditor has the burden of proof to establish that the writ was properly issued.*[12] The debtor can defeat the writ, if there was error in fact or law in either the procedural or substan-

---

[10] *Ownbey v. Morgan*, 256 U.S. 94, 110 (1921)

[11] La. Code of Civil Procedure, Article 3501, 3502

[12] La. Code of Civil Procedure, Article 3506; *C. A. Kaufman Co., Ltd. v. Gregory*, 244 La. 766, 154 So. 2d 392 (1963)

tive basis for the action. For example, prematurity, novation, payment, improper process, faulty pleading, inadequate surety, jurisdiction, parties, etc.—all are bases for dissolution of the writ. If the debtor is successful, his property is returned to him, and he can pursue his right to damages and attorney's fees.[13]

Sequestration merely *preserves* the property in accordance with the allegations of the creditor. A final judgment must issue against the debtor, and then the property can only be sold to satisfy the judgment. The court orders the issuing of a writ of fieri facias which, ultimately results in a sheriff's sale after judicial appraisal.

IV.

FUENTES AND *MITCHELL* ARE READILY DISTINGUISHABLE

Fuentes is concerned with common law conditional sales contracts[14]—*Mitchell* with the Louisiana civil law of contract. In *Fuentes* the vendor still has the title to the chattel. He has a *'leash'* on his debtor. The debtor can not dispose of the property to the detriment of his creditor. The creditor holds title and in a replevin action he seeks possession of the chattel to satisfy the debt.

In *Mitchell* the vendor has only an unrecorded privilege (lien), known as the *'vendor's privilege'* arising solely out of the transaction between vendor and

---

[13] *C. A. Kaufman Co., Ltd. v. Gregory*, supra.

[14] *Fuentes v. Shevin*, 407 U.S. 67 (1972)

purchaser. It is a basic right of the sales contract law of Louisiana and is '*sui generis*'.[15] The debtor has title and possession as a result of the sale. The vendor has only a privilege (lien), and then only so long as the chattel remains in the possession of the debtor. There is no requirement that the debtor retain possession or that he notify his vendor-creditor that he is going to transfer possession to another. He is free to sell or transfer to any other creditor; further, he could sell and keep the money. Sequestration is a conservatory writ under the supervision of the courts. The vendor still must prove his claim.

In *Fuentes* the owner of the property is merely regaining possession by using the administrative procedures of the sheriff's office. For all practical purposes in 98% of the cases the litigation is at an end.

In *Mitchell* title and possession are in the hands of a debtor who has been placed in default by his creditor in accordance with Louisiana law. To require a further judicial notice of default, as well as a hearing, results in an improper balancing of the equities of due process in favor of the debtor.[16]

V.

FUENTES A THREAT TO CREDIT SALES IN LOUISIANA

If the rule of *Fuentes* is applied to the present case to require a prior judicial notice and hearing in a Lou-

---

[15] *W. T. Grant Co. v. Mitchell*, supra.

[16] *Hurtado v. California*, 110 U.S. 531 (1884)

isiana sequestration proceeding, credit sales will be drastically reduced. The result will be to greatly curtail credit transactions to marginal income purchasers.

Louisiana has been unwilling to adopt the Uniform Commercial Code with its self-help provisions. It prefers its Civil Code with a property system vastly different from that of common law jurisdictions.[17]

This Louisiana case fits precisely the exception of *Fuentes* which holds that there may be cases in which a creditor could make a showing of immediate danger that a debtor will destroy or conceal disputed goods. For this reason the Louisiana Supreme Court was of the opinion, among others, that the requirement of due process had been satisfied.[18]

CONCLUSION

It is respectfully submitted that the Louisiana civil law affords greater security and due process to

---

[17] 26 Louisiana Law Review 189 (1966); 18 Louisiana Bar Journal 251 (1971).

[18] *W. T. Grant Co. v. Mitchell*, supra.—"The law of vendor's privilege in this state operates to favor the vendor and the vendee alike. The long history of vendor's privilege in Louisiana demonstrates that it enables the purchaser to acquire property he may otherwise be unable to buy as much as it induces the vendor to sell. Without the benefits accorded the vendor, it may well be concluded that in a substantial number of instances the possession and title to property would not be surrendered to prospective purchasers. Because of it, many impecunious citizens are enabled to acquire property to foster livelihood and provide for their sustenance."

the debtor than is available in common law jurisdictions and that *Fuentes* is not applicable to this cause.

Respectfully submitted,

WILLIAM J. GUSTE, JR.,
Attorney General,
State of Louisiana.

WARREN E. MOULEDOUX,
First Asst. Attorney General,
State of Louisiana.

LOUIS M. JONES,
Assistant Attorney General,
State of Louisiana.

7th Floor—2-3-4 Loyola Building
New Orleans, Louisiana 70112
(504) 527-8375

B-4556, 2-74

MITCHELL *v.* W. T. GRANT CO.

CERTIORARI TO THE SUPREME COURT OF LOUISIANA

No. 72-6160. Argued December 4, 1973—Decided May 13, 1974

The Louisiana Code of Civil Procedure makes available to a mortgage or lien holder a writ of sequestration to forestall waste or alienation of the encumbered property. While the writ is obtainable on the creditor's *ex parte* application without notice to the debtor or an opportunity for hearing, the writ will issue only upon a verified affidavit and upon a judge's authority (with respect to the parish involved in this case) after the creditor has filed a sufficient bond. The debtor may immediately seek dissolution of the writ, which must be ordered unless the creditor proves the grounds for issuance (existence of the debt, lien, and delinquency), failing which the court may order return of the property and assess damages, including attorney's fees, in the debtor's favor. Respondent seller filed suit against petitioner in the New Orleans City Court for the overdue balance of the price of certain personal property that petitioner had purchased under an installment sales contract and on which respondent had a vendor's lien. On respondent's application, the trial judge in accordance with the Louisiana procedure ordered sequestration of the property without prior notice or opportunity for a hearing, and denied petitioner's motion to dissolve the writ on the asserted ground, *inter alia*, that the seizure violated the Due Process Clause of the Fourteenth Amendment. The appellate courts affirmed. *Held:* The Louisiana sequestration procedure is not invalid, either on its face or as applied, and, considering the procedure as a whole, it effects a constitutional accommodation of the respective interests of the buyer and seller by providing for judicial control of the process from beginning to end, thus minimizing the risk of the creditor's wrongful interim possession, by protecting the debtor's interest in every way except to allow him initial possession, and by putting the property in the possession of the party who is able to furnish protection against loss or damage pending trial on the merits. *Fuentes* v. *Shevin*, 407 U. S. 67, distinguished. Pp. 603-620.

263 La. 627, 269 So. 2d 186, affirmed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACKMUN, POWELL, and REHNQUIST, JJ., joined. POWELL, J., filed a concurring opinion, *post*, p. 623. BRENNAN, J., filed a dissenting statement, *post*, p. 636. STEWART, J., filed a dissenting opinion in which DOUGLAS and MARSHALL, JJ., joined, and in which BRENNAN, J., joined in part, *post*, p. 629.

Robert J. Hobbs argued the cause for petitioner. With him on the briefs was *John W. Reed.*

Thomas J. O'Sullivan argued the cause for respondent. With him on the brief was *Marshall J. Favret.**

MR. JUSTICE WHITE delivered the opinion of the Court.

In this case, a state trial judge in Louisiana ordered the sequestration of personal property on the application of a creditor who had made an installment sale of the goods to petitioner and whose affidavit asserted delinquency and prayed for sequestration to enforce a vendor's lien under state law. The issue is whether the sequestration violated the Due Process Clause of the Fourteenth Amendment because it was ordered *ex parte*, without prior notice or opportunity for a hearing.

I

On February 2, 1972, respondent W. T. Grant Co. filed suit in the First City Court of the City of New Orleans, Louisiana, against petitioner, Lawrence Mitchell. The petition alleged the sale by Grant to Mitchell of a refrigerator, range, stereo, and washing machine, and an overdue and unpaid balance of the purchase price for said items in the amount of $574.17. Judgment for

**William J. Guste, Jr.*, Attorney General, *Warren E. Mouledoux*, First Assistant Attorney General, and *Louis M. Jones*, Assistant Attorney General, filed a brief for the State of Louisiana as *amicus curiae*.

that sum was demanded. It was further alleged that Grant had a vendor's lien on the goods and that a writ of sequestration should issue to sequester the merchandise pending the outcome of the suit. The accompanying affidavit of Grant's credit manager swore to the truth of the facts alleged in the complaint. It also asserted that Grant had reason to believe petitioner would "encumber, alienate or otherwise dispose of the merchandise described in the foregoing petition during the pendency of these proceedings, and that a writ of sequestration is necessary in the premises." Based on the foregoing petition and affidavit, and without prior notice to Mitchell or affording him opportunity for hearing, the judge of the First City Court, Arthur J. O'Keefe, then signed an order that "a writ of sequestration issue herein" and that "the Constable of this court sequester and take into his possession the articles of merchandise described in the foregoing petition, upon plaintiff furnishing bond in the amount of $1,125." Bond in that amount having been filed by the respondent, the writ of sequestration issued, along with citation to petitioner Mitchell, citing him to file a pleading or make appearance in the First City Court of the city of New Orleans within five days. The citation recited the filing of the writ of sequestration and the accompanying affidavit, order, and bond. On March 3 Mitchell filed a motion to dissolve the writ of sequestration issued on February 2.[1] The motion asserted that the personal property at issue had been seized under the writ on February 7, 1972, and claimed, first, that the goods were exempt from seizure under state law and, second, that the seizure violated the Due Process Clauses of the State and Federal Constitutions

[1] The motion asked for dissolution of the writ with respect to the refrigerator, stove, and washer. For some reason, unexplained by the parties, the motion was not addressed to the stereo.

in that it had occurred without prior notice and opportunity to defend petitioner's right to possession of the property.[2] The motion came on for hearing on March 14. It was then stipulated that a vendor's lien existed on the items, arguments of counsel were heard, and on March 16 the motion to dissolve was denied. The goods were held not exempt from seizure under state law. The trial court also ruled that "the provisional seizure enforced through sequestration" was not a denial of due process of law. "To the contrary," the trial judge said, "plaintiff insured defendant's right to due process by proceeding in accordance with Louisiana Law as opposed to any type of self-help seizure which would have denied defendant possession of his property without due process." The appellate courts of Louisiana refused to disturb the rulings of the trial court, the Supreme Court of Louisiana expressly rejecting petitioner's due process claims pressed under the Federal Constitution. 263 La. 627, 269 So. 2d 186 (1972). We granted certiorari, 411 U. S. 981 (1973), and now affirm the judgment of the Louisiana Supreme Court.

II

Petitioner's basic proposition is that because he had possession of and a substantial interest in the sequestered property, the Due Process Clause of the Fourteenth Amendment necessarily forbade the seizure without prior notice and opportunity for a hearing. In the circumstances presented here, we cannot agree.

[2] There is some dispute between the parties as to when the writ was actually executed by the sheriff. The sheriff's return, furnished by petitioner but apparently not in the record below, indicates that execution was on the 18th of February, rather than on the 7th. The Louisiana Supreme Court assumed that the writ was executed on the 7th. Because we see no legal consequence attaching to a choice of dates, we assume for purposes of decision that the writ was executed on the 7th.

Petitioner no doubt "owned" the goods he had purchased under an installment sales contract, but his title was heavily encumbered. The seller, W. T. Grant Co., also had an interest in the property, for state law provided it with a vendor's lien to secure the unpaid balance of the purchase price. Because of the lien, Mitchell's right to possession and his title were subject to defeasance in the event of default in paying the installments due from him. His interest in the property, until the purchase price was paid in full, was no greater than the surplus remaining, if any, after foreclosure and sale of the property in the event of his default and satisfaction of outstanding claims. See La. Code Civ. Proc. Ann., Art. 2373 (1961).[3] The interest of Grant, as seller of the property and holder of a vendor's lien, was measured by the unpaid balance of the purchase price. The monetary value of that interest in the property diminished as payments were made, but the value of the property as security also steadily diminished over time as it was put to its intended use by the purchaser.

Plainly enough, this is not a case where the property sequestered by the court is exclusively the property of the defendant debtor. The question is not whether a debtor's property may be seized by his creditors, *pendente lite*, where they hold no present interest in the property sought to be seized. The reality is that both seller and buyer had current, real interests in the property, and the definition of property rights is a matter of state law. Resolution of the due process question must take account not only of the interests of the buyer of the property but those of the seller as well.

With this duality in mind, we are convinced that the

[3] Article 2373 and other pertinent provisions of the Code, including those referred to in the text, are set out in the Appendix to this opinion.

Louisiana sequestration procedure is not invalid, either on its face or as applied. Sequestration under the Louisiana statutes is the modern counterpart of an ancient civil law device to resolve conflicting claims to property. Historically, the two principal concerns have been that, pending resolution of the dispute, the property would deteriorate or be wasted in the hands of the possessor and that the latter might sell or otherwise dispose of the goods. A minor theme was that official intervention would forestall violent self-help and retaliation. See Millar, Judicial Sequestration in Louisiana: Some Account of Its Sources, 30 Tul. L. Rev. 201, 206 (1956).

Louisiana statutes provide for sequestration where "one claims the ownership or right to possession of property, or a mortgage, lien, or privilege thereon . . . if it is within the power of the defendant to conceal, dispose of, or waste the property or the revenues therefrom, or remove the property from the parish, during the pendency of the action." Art. 3571. The writ, however, will not issue on the conclusory allegation of ownership or possessory rights. Article 3501[4] provides that the writ of sequestration shall issue "only when the nature of the claim and the amount thereof, if any, and the grounds relied upon for the issuance of the writ clearly appear from specific facts" shown by a verified petition or affidavit. In the parish where this

[4] Historically, the writ would issue only if the creditor had "good reason to fear" that the debtor would damage, alienate or waste the goods, and the creditor was required to show the grounds for such fear. Under present law, however, the apprehension of the creditor is no longer the issue, and the writ may be obtained when the goods are within the power of the debtor. Reporter's Comment (a) to La. Code Civ. Proc. Ann., Art. 3571. The necessity of showing such "power" is not irrelevant, because the vendor's privilege will not lie against goods not within the "power" of the debtor. Margolin, Civil Law, Vendor's Privilege, 4 Tul. L. Rev. 239 (1930); H. Daggett, On Louisiana Privileges and Chattel Mortgages § 51 (1942).

case arose, the clear showing required must be made to a judge,[5] and the writ will issue only upon his authorization and only after the creditor seeking the writ has filed a sufficient bond [6] to protect the vendee against all damages in the event the sequestration is shown to have been improvident.[7] Arts. 3501 and 3574.

The writ is obtainable on the creditor's *ex parte* application, without notice to the debtor or opportunity for a hearing, but the statute entitles the debtor immediately to seek dissolution of the writ, which must be ordered unless the creditor "proves the grounds upon which the writ was issued," Art. 3506, the existence of the debt, lien, and delinquency, failing which the court may order return of the property and assess damages in favor of the debtor, including attorney's fees.[8]

---

[5] Articles 282 and 283 of the Code provide, generally, that the court clerk may issue writs of sequestration. But Art. 281 confines the authority to the judge in Orleans Parish. There is no dispute in this case that judicial authority for the writ was required and that it was obtained as the statute requires. The validity of procedures obtaining in areas outside Orleans Parish is not at issue.

[6] As previously noted, the judgment prayed for in this case was in the amount of $574.17. Grant was ordered to furnish security in the amount of $1,125.

[7] When a writ is issued by the judge, it is served upon the debtor by the sheriff, Art. 3504, who thereafter becomes responsible for the property's safekeeping. See Johnson, Attachment and Sequestration: Provisional Remedies Under the Louisiana Code of Civil Procedure, 38 Tul. L. Rev. 1, 21–22 (1963). The plaintiff-creditor, however, see Art. 3576, may himself take possession of the goods if the defendant within 10 days does not secure possession of the goods by posting his own bond as permitted by Art. 3507, but he has no right to sell the goods until final judgment on the merits. Art. 3510.

[8] Damages would compensate for the period during which the buyer was deprived of the use of the property, but are not restricted to pecuniary loss. They may encompass injury to social standing or reputation as well as humiliation and mortification. Johnson, *supra*, n. 7, at 28.

The debtor, with or without moving to dissolve the sequestration, may also regain possession by filing his own bond to protect the creditor against interim damage to him should he ultimately win his case and have judgment against the debtor for the unpaid balance of the purchase price which was the object of the suit and of the sequestration. Arts. 3507 and 3508.[9]

In our view, this statutory procedure effects a constitutional accommodation of the conflicting interests of the parties. We cannot accept petitioner's broad assertion that the Due Process Clause of the United States Constitution guaranteed to him the use and possession of the goods until all issues in the case were judicially resolved after full adversary proceedings had been completed. It is certainly clear under this Court's precedents that issues can be limited in actions for possession. Indeed, in *Grant Timber & Mfg. Co.* v. *Gray*, 236 U. S. 133 (1915) (Holmes, J.), the Court upheld such limitations in possessory actions for real property in Louisiana. See also *Bianchi* v. *Morales*, 262 U. S. 170 (1923); *Lindsey* v. *Normet*, 405 U. S. 56 (1972). Petitioner's claim must accordingly be narrowed to one for a hearing on the issues in the possessory action—default, the existence of a lien, and possession of the debtor—before property is taken.

As to this claim, the seller here, with a vendor's lien to secure payment of the unpaid balance of purchase price, had the right either to be paid in accordance with his contract or to have possession of the goods for the purpose of foreclosing his lien and recovering the unpaid balance. By complaint and affidavit, the seller swore

[9] The debtor's bond necessary to repossess the property "shall exceed by one-fourth the value of the property as determined by the court, or shall exceed by one-fourth the amount of the claim, whichever is the lesser." Art. 3508.

to facts that would entitle him to immediate possession of the goods under his contract, undiminished in value by further deterioration through use of the property by the buyer. Wholly aside from whether the buyer, with possession and power over the property, will destroy or make away with the goods, the buyer in possession of consumer goods will undeniably put the property to its intended use, and the resale value of the merchandise will steadily decline as it is used over a period of time. Any installment seller anticipates as much, but he is normally protected because the buyer's installment payments keep pace with the deterioration in value of the security. Clearly, if payments cease and possession and use by the buyer continue, the seller's interest in the property as security is steadily and irretrievably eroded until the time at which the full hearing is held.

The State of Louisiana was entitled to recognize this reality and to provide somewhat more protection for the seller. This it did in Orleans Parish by authorizing the sequestration of property by a judge. At the same time, the buyer being deprived of possession, the seller was required to put up a bond to guarantee the buyer against damage or expense, including attorney's fees, in the event the sequestration is shown to be mistaken or otherwise improvident. The buyer is permitted to regain possession by putting up his own bond to protect the seller. Absent that bond, which petitioner did not file in this case, the seller would be unprotected against the inevitable deterioration in the value of his security if the buyer remained in possession pending trial on the merits. The debtor, unlike the creditor, does not stand ready to make the opposing party whole, if his possession, pending a prior hearing, turns out to be wrongful.

Second, there is the real risk that the buyer, with possession and power over the goods, will conceal or

transfer the merchandise to the damage of the seller. This is one of the considerations weighed in the balance by the Louisiana law in permitting initial sequestration of the property. An important factor in this connection is that under Louisiana law, the seller's vendor's lien expires if the buyer transfers possession. It follows that if the vendor is to retain his lien, superior to the rights of other creditors of the buyer, it is imperative when default occurs that the property be sequestered in order to foreclose the possibility that the buyer will sell or otherwise convey the property to third parties against whom the vendor's lien will not survive. The danger of destruction or alienation cannot be guarded against if notice and a hearing before seizure are supplied. The notice itself may furnish a warning to the debtor acting in bad faith.

Third, there is scant support in our cases for the proposition that there must be final judicial determination of the seller's entitlement before the buyer may be even temporarily deprived of possession of the purchased goods. On the contrary, it seems apparent that the seller with his own interest in the disputed merchandise would need to establish in any event only the probability that his case will succeed to warrant the bonded sequestration of the property pending outcome of the suit. Cf. *Bell* v. *Burson*, 402 U. S. 535 (1971); *Ewing* v. *Mytinger & Casselberry*, 339 U. S. 594 (1950). The issue at this stage of the proceeding concerns possession pending trial and turns on the existence of the debt, the lien, and the delinquency. These are ordinarily uncomplicated matters that lend themselves to documentary proof; and we think it comports with due process to permit the initial seizure on sworn *ex parte* documents, followed by the early opportunity to put the creditor to his proof. The nature of the issues at stake minimizes the risk that the

writ will be wrongfully issued by a judge. The potential damages award available, if there is a successful motion to dissolve the writ, as well as the creditor's own interest in avoiding interrupting the transaction, also contributes to minimizing this risk.

Fourth, we remain unconvinced that the impact on the debtor of deprivation of the household goods here in question overrides his inability to make the creditor whole for wrongful possession, the risk of destruction or alienation if notice and a prior hearing are supplied, and the low risk of a wrongful determination of possession through the procedures now employed.

Finally, the debtor may immediately have a full hearing on the matter of possession following the execution of the writ, thus cutting to a bare minimum the time of creditor- or court-supervised possession. The debtor in this case, who did not avail himself of this opportunity, can hardly expect that his argument on the severity of deprivation will carry much weight, and even assuming that there is real impact on the debtor from loss of these goods, pending the hearing on possession, his basic source of income is unimpaired.

The requirements of due process of law "are not technical, nor is any particular form of procedure necessary." *Inland Empire Council* v. *Millis*, 325 U. S. 697, 710 (1945). Due process of law guarantees "no particular form of procedure; it protects substantial rights." *NLRB* v. *Mackay Co.*, 304 U. S. 333, 351 (1938). "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Cafeteria Workers* v. *McElroy*, 367 U. S. 886, 895 (1961); *Stanley* v. *Illinois*, 405 U. S. 645, 650 (1972). Considering the Louisiana procedure as a whole, we are convinced that the State has reached a constitutional accommodation of the respective interests of buyer and seller.

III

Petitioner asserts that his right to a hearing before his possession is in any way disturbed is nonetheless mandated by a long line of cases in this Court, culminating in *Sniadach* v. *Family Finance Corp.*, 395 U. S. 337 (1969), and *Fuentes* v. *Shevin*, 407 U. S. 67 (1972). The pre-*Sniadach* cases are said by petitioner to hold that "the opportunity to be heard must precede any actual deprivation of private property." [10] Their import, however, is not so clear as petitioner would have it: they merely stand for the proposition that a hearing must be had before one is finally deprived of his property and do not deal at all with the need for a pretermination hearing where a full and immediate post-termination hearing is provided. The usual rule has been "[w]here only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for ultimate judicial determination of liability is adequate." *Phillips* v. *Commissioner*, 283 U. S. 589, 596–597 (1931). See also *Scottish Union & National Ins. Co.* v. *Bowland*, 196 U. S. 611, 632 (1905); *Springer*

[10] Petitioner relies particularly on: *Covey* v. *Town of Somers*, 351 U. S. 141 (1956); *New York* v. *N. Y., N. H. & H. R. Co.*, 344 U. S. 293 (1953); *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306 (1950); *Griffin* v. *Griffin*, 327 U. S. 220 (1946); *Opp Cotton Mills* v. *Administrator*, 312 U. S. 126 (1941); *West Ohio Gas Co.* v. *Pub. Util. Comm'n*, 294 U. S. 63 (1935); *United States* v. *Illinois Central R. Co.*, 291 U. S. 457 (1934); *Southern R. Co.* v. *Virginia*, 290 U. S. 190 (1933); *Goldsmith* v. *Board of Tax Appeals*, 270 U. S. 117 (1926); *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413 (1915); *Londoner* v. *Denver*, 210 U. S. 373 (1908); *Central of Georgia R. Co.* v. *Wright*, 207 U. S. 127 (1907); *Roller* v. *Holly*, 176 U. S. 398 (1900); *Hovey* v. *Elliott*, 167 U. S. 409 (1897); *Scott* v. *McNeal*, 154 U. S. 34 (1894); *Windsor* v. *McVeigh*, 93 U. S. 274 (1876); *Ray* v. *Norseworthy*, 23 Wall. 128 (1875); *Rees* v. *City of Watertown*, 19 Wall. 107 (1874); *Baldwin* v. *Hale*, 1 Wall. 223 (1864). Brief for Petitioner 10–11.

v. *United States*, 102 U. S. 586, 593–594 (1881). This generality sufficed to decide relatively modern cases. For example, in *Ewing* v. *Mytinger & Casselberry*, 339 U. S. 594 (1950), the statute at issue permitted multiple seizures of misbranded articles in commerce " 'when the Administrator has probable cause to believe from facts found, without hearing, by him or any officer or employee of the Agency that the misbranded article . . . would be in a material respect misleading to the injury or damage of the purchaser or consumer.' " *Id.*, at 595–596. The specific seizure challenged, made administratively without prior notice or hearing, concerned a concentrate of alfalfa, watercress, parsley, and synthetic vitamins, combined in a package with mineral tablets. There was no claim or suggestion of any possible threat to health. The sole official claim was that the labeling was misleading to the alleged damage of the purchaser. The Court sustained the *ex parte* seizure saying that "[w]e have repeatedly held that no hearing at the preliminary stage is required by due process so long as the requisite hearing is held before the final administrative order becomes effective." *Id.*, at 598. "It is sufficient, where only property rights are concerned, that there is at some stage an opportunity for a hearing and a judicial determination." *Id.*, at 599.[11]

[11] Conceding that the multiple seizure might cause irreparable damage to a business, the Court responded:

"The impact of the initiation of judicial proceedings is often serious. Take the case of the grand jury. It returns an indictment against a man without a hearing. It does not determine his guilt; it only determines whether there is probable cause to believe he is guilty. But that determination is conclusive on the issue of probable cause. As a result the defendant can be arrested and held for trial. See *Beavers* v. *Henkel*, 194 U. S. 73, 85; *Ex parte United States*, 287 U. S. 241, 250. The impact of an indictment is on the reputation or liberty of a man. The same is true where a prosecutor files an information charging violations of the law. The harm to property

More precisely in point, the Court had unanimously approved prejudgment attachment liens effected by creditors, without notice, hearing, or judicial order, saying that "nothing is more common than to allow parties alleging themselves to be creditors to establish in advance by attachment a lien dependent for its effect upon the result of the suit." "The fact that the execution is issued in the first instance by an agent of the State but not from a Court, followed as it is by personal notice and a right to take the case into court, is a familiar method in Georgia and is open to no objection." *Coffin Bros.* v. *Bennett*, 277 U. S. 29, 31 (1928). To the same effect was the earlier case of *Ownbey* v. *Morgan*, 256 U. S. 94 (1921). Furthermore, based on *Ownbey* and *Coffin*, the Court later sustained the constitutionality of the Maine attachment statute. *McKay* v. *McInnes*, 279 U. S. 820 (1929). In that case, a nonresident of Maine sued in the Maine courts to collect a debt from a resident of the State. As permitted by statute, and as an integral part of instituting the suit, the creditor attached the properties of the defendant, without notice and without judicial process of any kind. In sustaining the procedure, the Maine Supreme Court, 127 Me. 110, 141 A. 699 (1928), described the attachment as designed to create a lien for the creditor at the outset of the litigation. "Its purpose is simply to secure to the creditor the property which the debtor has at the time it is made so that it may be seized and levied upon in satisfaction of the debt after judgment and execution may be obtained." *Id.*,

---

and business can also be incalculable by the mere institution of proceedings. Yet it has never been held that the hand of government must be stayed until the courts have an opportunity to determine whether the government is justified in instituting suit in the courts. Discretion of any official may be abused. Yet it is not a requirement of due process that there be judicial inquiry before discretion can be exercised." 339 U. S., at 599.

at 115, 141 A., at 702. The attachment was deemed "part of the remedy provided for the collection of the debt," *ibid.*, and represented a practice that "had become fully established in Massachusetts, part of which Maine was at the time of the adoption of the Federal Constitution." *Id.*, at 114, 141 A., at 702. The judgment of the Maine court was affirmed without opinion, citing *Ownbey* and *Coffin*.

In *Sniadach* v. *Family Finance Corp.*, *supra*, it was said that *McKay* and like cases dealt with "[a] procedural rule that may satisfy due process for attachments in general" but one that would not "necessarily satisfy procedural due process in every case," nor one that "gives necessary protection to all property in its modern forms." 395 U. S., at 340. *Sniadach* involved the prejudgment garnishment of wages—"a specialized type of property presenting distinct problems in our economic system." *Ibid.* Because "[t]he leverage of the creditor on the wage earner is enormous" and because "prejudgment garnishment of the Wisconsin type may as a practical matter drive a wage-earning family to the wall," it was held that the Due Process Clause forbade such garnishment absent notice and prior hearing. *Id.*, at 341–342. In *Sniadach*, the Court also observed that garnishment was subject to abuse by creditors without valid claims, a risk minimized by the nature of the security interest there at stake and the protections to the debtor offered by Louisiana procedure. Nor was it apparent in *Sniadach* with what speed the debtor could challenge the validity of the garnishment, and obviously the creditor's claim could not rest on the danger of destruction of wages, the property seized, since their availability to satisfy the debt remained within the power of the debtor who could simply leave his job. The suing creditor in *Sniadach* had no prior interest in the property attached, and the opinion did not purport to govern the typical case of

the installment seller who brings a suit to collect an unpaid balance and who does not seek to attach wages pending the outcome of the suit but to repossess the sold property on which he had retained a lien to secure the purchase price. This very case soon came before the Court in *Fuentes* v. *Shevin*, where the constitutionality of the Florida and Pennsylvania replevin statutes was at issue. Those statutes permitted the secured installment seller to repossess the goods sold, without notice or hearing and without judicial order or supervision, but with the help of the sheriff operating under a writ issued by the court clerk at the behest of the seller. Because carried out without notice or opportunity for hearing and without judicial participation, this kind of seizure was held violative of the Due Process Clause. This holding is the mainstay of petitioner's submission here. But we are convinced that *Fuentes* was decided against a factual and legal background sufficiently different from that now before us and that it does not require the invalidation of the Louisiana sequestration statute, either on its face or as applied in this case.

The Florida law under examination in *Fuentes* authorized repossession of the sold goods without judicial order, approval, or participation. A writ of replevin was employed, but it was issued by the court clerk. As the Florida law was perceived by this Court, "[t]here is no requirement that the applicant make a convincing showing before the seizure," 407 U. S., at 73–74; the law required only "the bare assertion of the party seeking the writ that he is entitled to one" as a condition to the clerk's issuance of the writ. *Id.*, at 74. The Court also said that under the statute the defendant-buyer would "eventually" have an opportunity for a hearing, "as the defendant in the trial of the court action for repossession . . . ." *Id.*, at 75. The Pennsylvania law was considered to be essentially the same as that

of Florida except that it did "not require that there *ever* be opportunity for a hearing on the merits of the conflicting claims to possession of the replevied property." *Id.*, at 77. The party seeking the writ was not obliged to initiate a court action for repossession, was not required formally to allege that he was entitled to the property and had only to file an affidavit of the value of the property sought to be replevied. The Court distinguished the Pennsylvania and Florida procedures from that of the common law where, the Court said, "a state official made at least a summary determination of the relative rights of the disputing parties before stepping into the dispute and taking goods from one of them." *Id.*, at 80.

The Louisiana sequestration statute followed in this case mandates a considerably different procedure. A writ of sequestration is available to a mortgage or lien holder to forestall waste or alienation of the property, but, different from the Florida and Pennsylvania systems, bare, conclusory claims of ownership or lien will not suffice under the Louisiana statute. Article 3501 authorizes the writ "only when the nature of the claim and the amount thereof, if any, and the grounds relied upon for the issuance of the writ clearly appear from specific facts" shown by verified petition or affidavit. Moreover, in the parish where this case arose, the requisite showing must be made to a judge, and judicial authorization obtained. Mitchell was not at the unsupervised mercy of the creditor and court functionaries. The Louisiana law provides for judicial control of the process from beginning to end.[12] This control is one of the measures

[12] The approval of a writ of sequestration is not, as petitioner contends, a mere ministerial act. "Since a writ of sequestration issues without a hearing, specific facts as to the grounds relied upon for issuance must be contained in the verified petition in order that the issuing judge can properly evaluate the grounds." *Wright* v.

adopted by the State to minimize the risk that the *ex parte* procedure will lead to a wrongful taking. It is buttressed by the provision that should the writ be dissolved there are "damages for the wrongful issuance of a writ" and for attorney's fees "whether the writ is dissolved on motion or after trial on the merits." Art. 3506.

The risk of wrongful use of the procedure must also be judged in the context of the issues which are to be determined at that proceeding. In Florida and Pennsylvania property was only to be replevied in accord with state policy if it had been "wrongfully detained." This broad "fault" standard is inherently subject to factual determination and adversarial input. As in *Bell* v. *Burson*, where a driver's license was suspended without a prior hearing, when the suspension was premised on a fault standard, see *Vlandis* v. *Kline*, 412 U. S. 441, 446–447 (1973), in *Fuentes* this fault standard for replevin was thought ill-suited for preliminary *ex parte* determination. In Louisiana, on the other hand, the facts relevant to obtaining a writ of sequestration are narrowly confined. As we have indicated, docu-

---

Hughes, 254 So. 2d 293, 296–297 (La. Ct. App. 1971) (on rehearing). To the same effect is *Hancock Bank* v. *Alexander*, 256 La. 643, 237 So. 2d 669 (1970), where the court held that a simple allegation of indebtedness for money due on an automobile, where no deed of trust was referred to or produced, did not satisfy the "specific facts" test. The court stated:

"*Strict application* of the rules established for the issuance of conservatory writs has been uniformly required by the Courts in the past. It is implicit in those remedies that they should not be availed of unless the conditions which permit them exist; that is to say, it is a prerequisite to their issuance that proper grounds be alleged and sworn to." *Id.*, at 653–654, 237 So. 2d, at 672. (Emphasis added.)

Zion Mercantile Co. v. *Pierce*, 163 La. 477, 112 So. 371 (1927), upon which petitioner relies, is not to the contrary. The Louisiana court merely held there that it is not necessary to "file" papers requesting the writ with the clerk, or pay court costs, before the judge is empowered to issue the writ.

mentary proof is particularly suited for questions of the existence of a vendor's lien and the issue of default. There is thus far less danger here that the seizure will be mistaken and a corresponding decrease in the utility of an adversary hearing which will be immediately available in any event.

Of course, as in *Fuentes*, consideration of the impact on the debtor remains. Under Louisiana procedure, however, the debtor, Mitchell, was not left in limbo to await a hearing that might or might not "eventually" occur, as he was under the statutory schemes before the Court in *Fuentes*. Louisiana law expressly provides for an immediate hearing and dissolution of the writ "unless the plaintiff proves the grounds upon which the writ was issued." Art. 3506.

To summarize, the Louisiana system seeks to minimize the risk of error of a wrongful interim possession by the creditor. The system protects the debtor's interest in every conceivable way, except allowing him to have the property to start with, and this is done in pursuit of what we deem an acceptable arrangement *pendente lite* to put the property in the possession of the party who furnishes protection against loss or damage to the other pending trial on the merits.

The Court must be sensitive to the possible consequences, already foreseen in antiquity, of invalidating this state statute. Doing so might not increase private violence, but self-help repossession could easily lessen protections for the debtor. See, for example, *Adams* v. *Southern California First National Bank*, 492 F. 2d 324 (CA9 1973).[13] Here, the initial hardship to the debtor

[13] The advisability of requiring prior notice and hearing before repossession has been under study for several years. A number of possibilities have been put forward to modify summary creditor

is limited, the seller has a strong interest, the process proceeds under judicial supervision and management, and the prevailing party is protected against all loss. Our conclusion is that the Louisiana standards regulating the use of the writ of sequestration are constitutional. Mitchell

---

remedies, whether taken through some form of court process or effected by self-help under Art. 9 of the Uniform Commercial Code, § 9–503. Influenced by *Sniadach*, and providing preseizure notice and hearing, are two model acts drafted by the National Consumer Law Center: National Consumer Act §§ 5.206–5.208 (1970), and Model Consumer Credit Act § 7.205 (1973). Other similar reforms are reflected in the Report of the National Commission on Consumer Finance, Consumer Credit in the United States 30–31 (1972); the Wisconsin Consumer Act, Wis. Stat. Ann. §§ 421.101–427.105 (special pamphlet 1973); and the amendments to the Illinois Replevin Statute, Public Act 78–287, Ill. Laws 1973. Looking in the other direction and leaving summary procedures intact for the most part are the National Conference of Commissioners on Uniform State Laws, Committee on Uniform Consumer Credit Code, Uniform Consumer Credit Code, Working Redraft No. 5, Nov. 1973, §§ 5.110, 5.112; and the Permanent Editorial Board for the Uniform Commercial Code, Review Committee for Art. 9 of the Uniform Commercial Code, Final Report, § 9–503 (Apr. 25, 1971), together with revised Art. 9 of the U. C. C., 1972 Official Text and Comments, § 9–503.

As revealed in the various studies and proposals, the principal question yet to be satisfactorily answered is the impact of prior notice and hearing on the price of credit, and, more particularly, of the mix of procedural requirements necessary to minimize the cost. The commentators are in the throes of debate, see, *e. g.*, Symposium, Creditors' Rights, 47 S. Cal. L. Rev. 1–164 (1973), and basic questions remain unanswered. See generally Note, Self-Help Repossession; the Constitutional Attack, the Legislative Response, and the Economic Implications, 62 Geo. L. J. 273 (1973).

We indicate no view whatsoever on the desirability of one or more of the proposed reforms. The uncertainty evident in the current debate suggests caution in the adoption of an inflexible constitutional rule. Our holding in this case is limited to the constitutionality of the Louisiana sequestration procedures.

was not deprived of procedural due process in this case.[14] The judgment of the Supreme Court of Louisiana is affirmed.

So ordered.

APPENDIX TO OPINION OF THE COURT

STATUTES

PROVISIONS OF THE LOUISIANA CODE OF CIVIL PROCEDURE

Art. 281. Certain articles not applicable to Civil District Court for the Parish of Orleans

The provisions of Articles 282 through 286 do not apply to the clerk and the deputy clerks of the Civil District Court for the Parish of Orleans.

Art. 282. Acts which may be done by district court clerk

The clerk of a district court may:

(1) Grant an appeal and fix the return day thereof; fix the amount of the bond for an appeal, or for the issuance of a writ of attachment or of sequestration, or for the release of property seized under any writ, unless fixed by law; appoint an attorney at law to represent a nonresident, absent, incompetent, or unrepresented defendant; or dismiss without prejudice, on application of plaintiff, an action or proceeding in which no exception, answer, or intervention has been filed; and . . . .

. . . . . .

---

[14] We are advised by counsel for petitioner of a tide of cases following *Fuentes* and are cautioned that affirmance in this case would set off a riptide with considerable consequences. We perceive no such result. Our decision will not affect recent cases dealing with garnishment or summary self-help remedies of secured creditors or landlords. Nor is it at all clear, with an exception or two, that the reported cases invalidating replevin or similar statutes dealt with situations where there was judicial supervision of seizure or foreclosure from the outset.

Art. 283. Orders and judgments which may be signed by district court clerk

. . . . . .

(2) An order for the issuance of executory process, of a writ of attachment or of sequestration, or of garnishment process under a writ of fieri facias, attachment, or of sequestration; the release under bond of property seized under a writ of attachment or of sequestration; or to permit the filing of an intervention . . . .

. . . . . .

Art. 325. Right of entry for execution; may require assistance of others if resistance offered or threatened

In the execution of a writ, mandate, order, or judgment of a court, the sheriff may enter on the lands, and into the residence or other building, owned or occupied by the judgment debtor or defendant. . . .

Art. 2373. Distribution of proceeds of sale

After deducting the costs, the sheriff shall first pay the amount due the seizing creditor, then the inferior mortgages, liens, and privileges on the property sold, and shall pay to the debtor whatever surplus may remain.

Art. 3501. Petition; affidavit; security

A writ of attachment or of sequestration shall issue only when the nature of the claim and the amount thereof, if any, and the grounds relied upon for the issuance of the writ clearly appear from specific facts shown by the petition verified by, or by the separate affidavit of, the petitioner, his counsel or agent.

The applicant shall furnish security as required by law for the payment of the damages the defendant may sustain when the writ is obtained wrongfully.

Art. 3504. Return of sheriff; inventory

The sheriff, after executing a writ of attachment or of sequestration, shall deliver to the clerk of the court from

which the writ issued a written return stating the manner in which he executed the writ. He shall annex to the return an inventory of the property seized.

Art. 3506. Dissolution of writ; damages

The defendant by contradictory motion may obtain the dissolution of a writ of attachment or of sequestration, unless the plaintiff proves the grounds upon which the writ was issued. If the writ of attachment or of sequestration is dissolved, the action shall then proceed as if no writ had been issued.

The court may allow damages for the wrongful issuance of a writ of attachment or of sequestration on a motion to dissolve, or on a reconventional demand. Attorney's fees for the services rendered in connection with the dissolution of the writ may be included as an element of damages whether the writ is dissolved on motion or after trial on the merits.

Art. 3507. Release of property by defendant; security

A defendant may obtain the release of the property seized under a writ of attachment or of sequestration by furnishing security for the satisfaction of any judgment which may be rendered against him.

Art. 3508. Amount of security for release of attached or sequestered property

The security for the release of property seized under a writ of attachment or of sequestration shall exceed by one-fourth the value of the property as determined by the court, or shall exceed by one-fourth the amount of the claim, whichever is the lesser.

Art. 3510. Necessity for judgment and execution

Except as provided in Article 3513 [perishables], a final judgment must be obtained in an action where a writ of attachment or of sequestration has issued before the property seized can be sold to satisfy the claim.

Art. 3571. Grounds for sequestration

When one claims the ownership or right to possession of property, or a mortgage, lien, or privilege thereon, he may have the property seized under a writ of sequestration, if it is within the power of the defendant to conceal, dispose of, or waste the property or the revenues therefrom, or remove the property from the parish, during the pendency of the action.

Art. 3574. Plaintiff's security

An applicant for a writ of sequestration shall furnish security for an amount determined by the court to be sufficient to protect the defendant against any damage resulting from a wrongful issuance, unless security is dispensed with by law.

Art. 3576. Release of property under sequestration

If the defendant does not effect the release of property seized under a writ of sequestration, as permitted by Article 3507, within ten days of the seizure, the plaintiff may effect the release thereof by furnishing the security required by Article 3508.

MR. JUSTICE POWELL, concurring.

In sweeping language, *Fuentes* v. *Shevin*, 407 U. S. 67 (1972), enunciated the principle that the constitutional guarantee of procedural due process requires an adversary hearing before an individual may be temporarily deprived of any possessory interest in tangible personal property, however brief the dispossession and however slight his monetary interest in the property. The Court's decision today withdraws significantly from the full reach of that principle, and to this extent I think it fair to say that the *Fuentes* opinion is overruled.

I could have agreed that the Florida and Pennsylvania statutes in *Fuentes* were violative of due process be-

cause of their arbitrary and unreasonable provisions. It seems to me, however, that it was unnecessary for the *Fuentes* opinion to have adopted so broad and inflexible a rule, especially one that considerably altered settled law with respect to commercial transactions and basic creditor-debtor understandings. Narrower grounds existed for invalidating the replevin statutes in that case.

I

The constitutional guarantee of procedural due process applies to governmental deprivation of a legitimate "property" or "liberty" interest within the meaning of the Fifth or Fourteenth Amendment. It requires that any such deprivation be accompanied by minimum procedural safeguards, including some form of notice and a hearing. *Arnett* v. *Kennedy*, *ante*, p. 164 (separate opinion of POWELL, J.); *Board of Regents* v. *Roth*, 408 U. S. 564 (1972); *Perry* v. *Sindermann*, 408 U. S. 593 (1972). In the present case, there can be no doubt that under state law both petitioner and respondent had property interests in the goods sought to be sequestered. Petitioner, as the vendee-debtor under an installment sales contract, had both title and possession of the goods subject to his contractual obligation to continue the installment payments. Respondent, as the vendor-creditor, had a vendor's lien on the goods as security for the unpaid balance.

The determination of what due process requires in a given context depends on a consideration of both the nature of the governmental function involved and the private interests affected. *Cafeteria Workers* v. *McElroy*, 367 U. S. 886, 895 (1961); *Goldberg* v. *Kelly*, 397 U. S. 254, 263–266 (1970). The governmental function in the instant case is to provide a reasonable and fair framework of rules which facilitate commercial transactions on a

credit basis. The Louisiana sequestration statute is designed to protect the legitimate interests of both creditor and debtor. As to the creditor, there is the obvious risk that a defaulting debtor may conceal, destroy, or further encumber the goods and thus deprive the creditor of his security. This danger is particularly acute where, as here, the vendor's lien may be vitiated merely by transferring the goods from the debtor's possession. In addition, the debtor's continued use of the goods diminishes their resale value. In these circumstances, a requirement of notice and an adversary hearing *before* sequestration would impose a serious risk that a creditor could be deprived of his security.

Against this concern must be balanced the debtor's real interest in uninterrupted possession of the goods, especially if the sequestration proves to be unjustified. To be sure, repossession of certain items of personal property, even for a brief period, may cause significant inconvenience. But it can hardly be said that temporary deprivation of such property would necessarily place a debtor in a "brutal need" situation. *Goldberg* v. *Kelly, supra; Arnett* v. *Kennedy, supra.*

In my view, the constitutional guarantee of procedural due process is fully satisfied in cases of this kind where state law requires, as a precondition to invoking the State's aid to sequester property of a defaulting debtor, that the creditor furnish adequate security and make a specific factual showing before a neutral officer or magistrate of probable cause to believe that he is entitled to the relief requested. An opportunity for an adversary hearing must then be accorded promptly after sequestration to determine the merits of the controversy, with the burden of proof on the creditor.

The Louisiana statute *sub judice* satisfies these requirements and differs materially from the Florida and

Pennsylvania statutes in *Fuentes*.[1] Those statutes did not require an applicant for a writ of replevin to make any factually convincing showing that the property was wrongfully detained or that he was entitled to the writ. Moreover, the Florida statute provided only that a post-seizure hearing be held eventually on the merits of the competing claims, and it required the debtor to initiate that proceeding. The Pennsylvania statute made no provision for a hearing at any time.

By contrast, the Louisiana statute applicable in Orleans Parish authorizes issuance of a writ of sequestration "only when the nature of the claim and the amount thereof, if any, and the grounds relied upon . . . clearly appear from specific facts shown by the petition verified by, or by the separate affidavit of, the petitioner, his counsel or agent." La. Code Civ. Proc. Ann., Art. 3501 (1961). The Louisiana statute also provides for an immediate hearing, and the writ is dissolved "unless the

[1] The Court outlined the deficiencies of the statutes in *Fuentes*:

"There is [under the Florida statute] no requirement that the applicant make a convincing showing before the seizure that the goods are, in fact, 'wrongfully detained.' Rather, Florida law automatically relies on the *bare* assertion of the party seeking the writ that he is entitled to one and allows a court clerk to issue the writ summarily. It requires only that the applicant file a complaint, initiating a court action for repossession and reciting in conclusory fashion that he is 'lawfully entitled to the possession' of the property, and that he file a security bond . . . ." 407 U. S., at 73–74 (emphasis added).

The Court noted that the Pennsylvania statute required even less than the Florida statute, since the party seeking the writ "need not even formally allege that he is lawfully entitled to the property." *Id.*, at 78. All that was required was the filing of an "'affidavit of the value of the property to be replevied.'" *Ibid.* Moreover, the Pennsylvania law did "not require that there *ever* be opportunity for a hearing on the merits of the conflicting claims to possession of the replevied property." *Id.*, at 77.

[creditor] proves the grounds upon which the writ was issued." Art. 3506.

The Court's opinion makes these points well, and I need not elaborate them further. In brief, the Louisiana statute satisfies the essential prerequisites of procedural due process and represents a fairer balancing of the interests of the respective parties than the statutes in *Fuentes*. I therefore agree that the Louisiana procedure should be sustained against petitioner's challenge.

II

MR. JUSTICE STEWART reproves the Court for not adhering strictly to the doctrine of *stare decisis*. *Post*, at 634–636. To be sure, *stare decisis* promotes the important considerations of consistency and predictability in judicial decisions and represents a wise and appropriate policy in most instances. But that doctrine has never been thought to stand as an absolute bar to reconsideration of a prior decision, especially with respect to matters of constitutional interpretation.[2] Where the Court errs in its construction of a statute, correction may always be accomplished by legislative action. Revision of a constitutional interpretation, on the other hand, is often impossible as a practical matter, for it requires the cumbersome route of constitutional amendment. It is thus not only our prerogative but also our duty to re-examine a precedent where its reasoning or understanding of the Constitution is fairly called into

---

[2] See *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 93 (1936) (Stone and Cardozo, JJ., concurring in result); *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 405, 406–408 (1932) (Brandeis, J., dissenting). For the view that *stare decisis* need not always apply even to questions of statutory interpretation, see *Boys Markets* v. *Retail Clerks Union*, 398 U. S. 235, 255 (1970) (Stewart, J., concurring).

question. And if the precedent or its rationale is of doubtful validity, then it should not stand. As Mr. Chief Justice Taney commented more than a century ago, a constitutional decision of this Court should be "always open to discussion when it is supposed to have been founded in error, [so] that [our] judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported." *Passenger Cases*, 7 How. 283, 470 (1849).

Moreover, reconsideration is particularly appropriate in the present case. To the extent that the *Fuentes* opinion established a Procrustean rule of a prior adversary hearing, it marked a significant departure from past teachings as to the meaning of due process.[3] As the Court stated in *Cafeteria Workers* v. *McElroy*, 367 U. S., at 895, "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." The *Fuentes* opinion not only eviscerated that principle but also sounded a potential death knell for a panoply of statutes in the com-

[3] The *Fuentes* opinion relied primarily on *Sniadach* v. *Family Finance Corp.*, 395 U. S. 337 (1969). That case involved a prejudgment garnishment of wages in which the creditor had no pre-existing property interest. It is readily distinguishable from the instant case where the creditor does have a pre-existing property interest as a result of the vendor's lien which attached upon execution of the installment sales contract. Indeed, depending on the number of installments which have been paid, the creditor's interest may often be greater than the debtor's. Thus, we deal here with mutual property interests, both of which are entitled to be safeguarded. *Fuentes* overlooked this vital point.

In addition, the Court recognized in *Sniadach* that prejudgment garnishment of wages could as a practical matter "impose tremendous hardship" and "drive a wage-earning family to the wall." *Id.*, at 340, 341–342. By contrast, there is no basis for assuming that sequestration of a debtor's goods would necessarily place him in such a "brutal need" situation.

mercial field.[4] This fact alone justifies a re-examination of its premises. The Court today reviews these at length, and I join its opinion because I think it represents a reaffirmation of the traditional meaning of procedural due process.

MR. JUSTICE STEWART, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL concur, dissenting.

The Louisiana sequestration procedure now before us is remarkably similar to the statutory provisions at issue in *Fuentes* v. *Shevin*, 407 U. S. 67 (1972). In both cases the purchaser-in-possession of the property is not afforded any prior notice of the seizure or any opportunity to rebut the allegations of the vendor before the property is summarily taken from him by agents of the State. In both cases all that is required to support the issuance of the writ and seizure of the goods is the filing of a complaint and an affidavit containing *pro forma* allegations in support of the seller's purported entitlement to the goods in question. Since the procedure in both cases is completely *ex parte*, the state official charged with issuing the writ can do little more than determine the formal sufficiency of the plaintiff's allegations before ordering the state agents to take the goods from the defendant's possession.[1]

---

[4] For a discussion of the far-reaching implications of the *Fuentes* rationale, see Clark & Landers, *Sniadach, Fuentes* and Beyond: The Creditor Meets the Constitution, 59 Va. L. Rev. 335 (1973). The authors suggest that *Fuentes* could require invalidation of many summary creditor remedies in their present form.

[1] The Louisiana Supreme Court held that *Fuentes* did not govern the present case. Essentially, that court held that because the Louisiana vendor's privilege is defeated if the vendee alienates the property over which the vendor has the privilege, this case falls within the language in *Fuentes* that "[t]here may be cases in which a creditor could make a showing of immediate danger that a debtor

The question before the Court in *Fuentes* was what procedures are required by the Due Process Clause of the Fourteenth Amendment when a State, at the behest of a private claimant, seizes goods in the possession of another pending judicial resolution of the claimant's assertion of superior right to possess the property. The Court's analysis of this question began with the proposition that, except in exceptional circumstances,[2] the deprivation of a property interest encompassed within the Fourteenth Amendment's protection must be preceded by notice to the affected party and an opportunity to be heard. The Court then went on to hold that a debtor-vendee's interest in the continued possession of purchased goods was "property" within the Fourteenth Amendment's protection and that the "temporary, nonfinal deprivation of [this] property [is] . . . a 'deprivation' in the terms of the Fourteenth Amendment." 407 U. S., at 85. Accordingly, *Fuentes* held that such a deprivation of property must be preceded by notice to the possessor and by an opportunity for a hearing appropriate under the circumstances. Matters such as

---

will destroy or conceal disputed goods." *Fuentes* v. *Shevin*, 407 U. S. 67, 93. The Court today quite correctly does not embrace this rationale. In discussing the " 'extraordinary situations' " that might justify the summary seizure of goods, the *Fuentes* opinion stressed that these situations "must be truly unusual." *Id.*, at 90. Specifically, it referred to "special situations demanding prompt action." *Id.*, at 93. In effect, the Louisiana Supreme Court held that *all* vendor-creditors in the State can be conclusively presumed to be in this "special" situation, regardless of whether the individual vendor could make a showing of immediate danger in his particular case. But if the situation of all such vendors in a State could be conclusively presumed to meet the "extraordinary," "unusual," and "special" conditions referred to in *Fuentes*, the basic constitutional rule of that case would be wholly obliterated in the State.

[2] 407 U. S., at 90–93.

requirements for the posting of bond and the filing of sworn factual allegations, the length and severity of the deprivation, the relative simplicity of the issues underlying the creditor's claim to possession, and the comparative "importance" or "necessity" of the goods involved were held to be relevant to determining the form of notice and hearing to be provided, but not to the constitutional need for notice and an opportunity for a hearing of some kind.

The deprivation of property in this case is identical to that at issue in *Fuentes*, and the Court does not say otherwise. Thus, under *Fuentes*, due process of law permits Louisiana to effect this deprivation only after notice to the possessor and opportunity for a hearing. Because I would adhere to the holding of *Fuentes*, I dissent from the Court's opinion and judgment upholding Louisiana's *ex parte* sequestration procedure, which provides that the possessor of the property shall never have advance notice or a hearing of any kind.

As already noted, the deprivation of property in this case is identical to that in *Fuentes*. But the Court says that this is a different case for three reasons: (1) the plaintiff who seeks the seizure of the property must file an affidavit stating "specific facts" that justify the sequestration; (2) the state official who issues the writ of sequestration is a judge instead of a clerk of the court; and (3) the issues that govern the plaintiff's right to sequestration are limited to "the existence of a vendor's lien and the issue of default," and "[t]here is thus far less danger here that the seizure will be mistaken and a corresponding decrease in the utility of an adversary hearing," *ante*, at 618. The Court's opinion in *Fuentes*, however, explicitly rejected each of these factors as a ground for a difference in decision.

The first two purported distinctions relate solely to

the procedure by which the creditor-vendor secures the State's aid in summarily taking goods from the purchaser's possession. But so long as the Louisiana law routinely permits an *ex parte* seizure without notice to the purchaser, these procedural distinctions make no constitutional difference.

The Louisiana affidavit requirement can be met by any plaintiff who fills in the blanks on the appropriate form documents and presents the completed forms to the court. Although the standardized form in this case called for somewhat more information than that required by the Florida and Pennsylvania statutes challenged in *Fuentes*, such *ex parte* allegations "are hardly a substitute for a prior hearing, for they test no more than the strength of the applicant's own belief in his rights. Since his private gain is at stake, the danger is all too great that his confidence in his cause will be misplaced. Lawyers and judges are familiar with the phenomenon of a party mistakenly but firmly convinced that his view of the facts and law will prevail, and therefore quite willing to risk the costs of litigation." 407 U. S., at 83.

Similarly, the fact that the official who signs the writ after the *ex parte* application is a judge instead of a court clerk is of no constitutional significance. Outside Orleans Parish, this same function is performed by the court clerk. There is nothing to suggest that the nature of this duty was at all changed when the law was amended to vest it in a judge rather than a clerk in this one parish. Indeed, the official comments declare that this statutory revision was intended to "mak[e] no change in the law." [3] Whether the issuing functionary be a judge or a court clerk, he can in any event do no more than ascertain the formal sufficiency of the plaintiff's allegations, after

[3] La. Code Civ. Proc. Ann., Art. 281 (1961).

which the issuance of the summary writ becomes a simple ministerial act.[4]

The third distinction the Court finds between this case and *Fuentes* is equally insubstantial. The Court says the issues in this case are "particularly suited" to *ex parte* determination, in contrast to the issues in *Fuentes*, which were "inherently subject to factual determination and adversarial input," *ante*, at 617, 618. There is, however, absolutely no support for this purported distinction. In this case the Court states the factual issues as "the existence of a vendor's lien and the issue of default." *Ante*, at 618. The issues upon which replevin depended in *Fuentes* were no different; the creditor-vendor needed only to establish his security interest and the debtor-vendee's default. As MR. JUSTICE WHITE acknowledged in his *Fuentes* dissent, the essential issue at any hearing would be whether "there is reasonable basis for his [the creditor-vendor's] claim of default." 407 U. S., at 99–100. Thus, the Court produces this final attempted distinction out of whole cloth.

Moreover, *Fuentes* held that the relative complexity of the issues in dispute is not relevant to determining whether a prior hearing is required by due process. "The issues decisive of the ultimate right to continued possession, of course, may be quite simple. The simplicity of the issues might be relevant to the formality or scheduling of a prior hearing. But it certainly cannot undercut the right to a prior hearing of some kind." *Id.*, at 87 n. 18 (citation omitted). Similarly, the probability of suc-

[4] The Louisiana authorities cited by the Court are not to the contrary. *Wright* v. *Hughes*, 254 So. 2d 293 (La. Ct. App. 1971), and *Hancock Bank* v. *Alexander*, 256 La. 643, 237 So. 2d 669 (1970), stand only for the proposition that a writ should not issue unless the sworn allegations are formally sufficient, which may mean nothing more than that the proper standardized form be completely filled in.

cess on the factual issue does not affect the right to prior notice and an opportunity to be heard.

> "The right to be heard does not depend upon an advance showing that one will surely prevail at the hearing. To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits. It is enough to invoke the procedural safeguards of the Fourteenth Amendment that a significant property interest is at stake, whatever the ultimate outcome of a hearing on the contractual right to continued possession and use of the goods." *Id.*, at 87 (internal quotation marks and citation omitted).

In short, this case is constitutionally indistinguishable from *Fuentes* v. *Shevin*, and the Court today has simply rejected the reasoning of that case and adopted instead the analysis of the *Fuentes* dissent. In light of all that has been written in *Fuentes* and in this case, it seems pointless to prolong the debate. Suffice it to say that I would reverse the judgment before us because the Louisiana sequestration procedure fails to comport with the requirements of due process of law.

I would add, however, a word of concern. It seems to me that unless we respect the constitutional decisions of this Court, we can hardly expect that others will do so. Cf. *Roofing Wholesale Co.* v. *Palmer*, 108 Ariz. 508, 502 P. 2d 1327 (1972). A substantial departure from precedent can only be justified, I had thought, in the light of experience with the application of the rule to be abandoned or in the light of an altered historic environ-

ment.[5] Yet the Court today has unmistakably overruled a considered decision of this Court that is barely two years old, without pointing to any change in either societal perceptions or basic constitutional understandings that might justify this total disregard of *stare decisis*.

The *Fuentes* decision was in a direct line of recent cases in this Court that have applied the procedural due process commands of the Fourteenth Amendment to prohibit governmental action that deprives a person of a statutory or contractual property interest with no advance notice or opportunity to be heard.[6] In the short time that has elapsed since the *Fuentes* case was decided, many state and federal courts have followed it in assessing the constitutional validity of state replevin statutes and other comparable state laws.[7] No data have been brought to our attention to indicate that these decisions, granting to otherwise defenseless consumers the simple rudiments of due process of law, have worked any untoward change in the consumer credit market or in other commercial relationships. The only perceivable change that has occurred since the *Fuentes* case is in the makeup of this Court.[8]

---

[5] See, *e. g.*, *North Dakota Board of Pharmacy* v. *Snyder's Drug Stores*, 414 U. S. 156 (1973); *Brown* v. *Board of Education*, 347 U. S. 483 (1954).

[6] See, *e. g.*, *Goldberg* v. *Kelly*, 397 U. S. 254 (1970); *Sniadach* v. *Family Finance Corp.*, 395 U. S. 337 (1969); and *Bell* v. *Burson*, 402 U. S. 535 (1971).

[7] See, *e. g.*, *Turner* v. *Colonial Finance Corp.*, 467 F. 2d 202 (CA5 1972); *Sena* v. *Montoya*, 346 F. Supp. 5 (NM 1972); *Dorsey* v. *Community Stores Corp.*, 346 F. Supp. 103 (ED Wis. 1972); *Thorp Credit, Inc.* v. *Barr*, 200 N. W. 2d 535 (Iowa 1972); *Inter City Motor Sales* v. *Common Pleas Judge*, 42 Mich. App. 112, 201 N. W. 2d 378 (1972); and *Montoya* v. *Blackhurst*, 84 N. M. 91, 500 P. 2d 176 (1972).

[8] Although MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST

A basic change in the law upon a ground no firmer than a change in our membership invites the popular misconception that this institution is little different from the two political branches of the Government. No misconception could do more lasting injury to this Court and to the system of law which it is our abiding mission to serve.

MR. JUSTICE BRENNAN is in agreement that *Fuentes* v. *Shevin*, 407 U. S. 67 (1972), requires reversal of the judgment of the Supreme Court of Louisiana.

---

were Members of the Court at the time that *Fuentes* v. *Shevin* was announced, they were not Members of the Court when that case was argued, and they did not participate in its "consideration or decision." 407 U. S., at 97.